TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 105

LENG MAY MA, PETITIONER,

vs.

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 17, 1957

CERTIORARI GRANTED JUNE 3, 1957

No. 14252

United States
Court of Appeals
for the Ninth Circuit

LENG MAY MA,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-24-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorney for Respondent and Appellee.

In the United States District Court in and for the Northern District of California, Southern Division

No. 33302

In the Matter of the

Application of LENG MAY MA for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable United States District Judge of the United States District Court in and for the Northern District of California, Southern Division

The Petition of Joseph S. Hertogs, on behalf of Leng May Ma respectfully shows:

I.

That the said Leng May Ma, the person in whose behalf this writ is applied for, is now detained and restrained of her liberty by the respondent, Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco District, and his officers and agents; that the said Leng May Ma is now confined in the Detention Facilities of the Immigration and Naturalization Service, 630 Sansome Street, City and County of San Francisco, State of California.

II.

That no one has filed, in behalf of the said Leng May Ma, a previous application for a writ of

Habeas Corpus in and about the matter set forth herein to any Court.

III.

That your petitioner has been advised by the San Francisco office of the Immigration and Naturalization Service that the said Leng May Ma is to be deported from the United States to Communist China and that such deportation will take effect unless this Court intervenes to prevent deportation at this time.

IV.

(a) That the said Leng May Ma is a native of China who claims to have acquired United States citizenship at the time of her birth pursuant to the provisions of Section 1993, Revised Statutes of the United States;

(b) That the said Leng May Ma was accorded a hearing by an officer of the Immigration and Naturalization Service upon the occasion of her arrival from China on May 4, 1951, at San Francisco, and on numerous dates subsequent to her arrival on May 4, 1951; that it was the decision of the Immigration and Naturalization Service that the said Leng May Ma had failed to establish her identity as a United States national;

(c) That in a letter from the Immigration Service dated on or about January 5, 1954, the said Leng May Ma was notified that she should surrender herself to the Officer in Charge of the Immigration and Naturalization Service on January 15, 1954, for deportation to China.

V.

(a) That in January of 1954, there was caused to be filed with the appropriate office of the Immigration and Naturalization Service, in accordance with the provisions of 8 C.F.R. 243.3(h) a petition praying for a stay of deportation of the said Leng May Ma on the ground that the said Leng May Ma would be subject to physical persecution and probable death at the hands of the existing government of the place where the said Leng May Ma is to be deported;

(b) That there is attached hereto and made a part hereof, and incorporated as if fully set forth herein, marked Exhibit A, a copy of a letter advising that the said Leng May Ma is not entitled to a stay of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act of 1952.

VI.

That your petitioner has been advised by an offical executive of the District Director of the Immigration and Naturalization Service at San Francisco that the said Leng May Ma will be deported in accordance with the instruction from the Central Office of that Service as soon as travel arrangements can be completed.

VII.

That the said detention and restraint of the said Leng May Ma are illegal, and their illegality consists in the following, among others, to wit:

(a) That the said Leng May Ma has been denied the right guaranteed to her by the "due process of law" clause of the Fifth Amendment to the Constitution of the United States;

(b) That the contemplated deportation is in conflict with and contrary to the law and expression of Congress not to deport a person to a country or territory under enemy domination and where such person would be subject to physical persecution;

(c) That the decision of the Immigration and Naturalization Service denying the petition filed in behalf of the said Leng May Ma for a stay of deportation pursuant to the provisions of 8 U.S.C.A. 1253(h) is an abuse of discretion;

(d) That the contemplated deportation would be unusual and inhumane punishment contrary to the laws of the United States.

Wherefore, your petitioner prays that a writ of Habeas Corpus issue releasing the said Leng May Ma from detention and custody of the respondent, Bruce G. Barber, as District Director of the San Francisco District, Immigration and Naturalization Service, and for other and further relief as the Court may deem just and proper in the circumstances.

/s/ JOSEPH S. HERTOGS.

Duly Verified.

EXHIBIT A

(Copy)

United States Department of Justice
Immigration and Naturalization Service
San Francisco, California

January 21, 1954.

T-1 497 257
and T-1 497 260

Jackson & Hertogs, Attorneys at Law,
580 Washington Street,
San Francisco 11, California.

Att: Z. B. Jackson.

Gentlemen:

Re: Lee Non Sung and
Leng May Ma.

Reference is made to your letter of January 18, 1954, asking for an early decision on the aliens' requests for withholding of deportation based on allegation of physical persecution should deportation to China be effected.

Since the aliens have been excluded from admission to the United States they are not eligible for the relief afforded by Section 243(h) of the Immigration and Nationality Act and no stay of deportation will be granted.

Yours very truly,

BRUCE G. BARBER,
District Director.

By T. E. FLENNIKEN,
Acting Chief, Detention, Deportation and Parole Section.

[Endorsed]: Filed January 26, 1954.

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

It appearing that the petition for writ of habeas corpus filed herein does not state facts sufficient to warrant the writ (8 USC 1253h) it is,

Ordered that the petition for writ of habeas corpus be and the same is hereby denied.

Dated: January 28th, 1954.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed January 28, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given this 29th day of Jan. 1954, that Leng May Ma hereby appeals to the United

States Court of Appeals for the Ninth Circuit from the judgment of this Court entered on the 28th day of Jan. 1954, in favor of the respondent and against the said Leng May Ma, plaintiff.

JACKSON & HERTOGS,

By /s/ JOSEPH S. HERTOGS,
Attorneys for Plaintiff.

[Endorsed]: Filed January 29, 1954.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, the plaintiff has appealed to the United States Court of Appeals, for the Ninth Circuit from a decision of this court denying a writ of Habeas Corpus.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, Maryland Casualty Company, a corporation duly organized and existing under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, does undertake and promises on the part of the Plaintiff, to secure the payment of costs if the appeal is dismissed, or such costs as the Appellate Court may award not exceeding the sum of Two Hundred Fifty and No/100 ($250.00) Dollars, to which amount it acknowledges itself bound.

It is expressly agreed by the Surety that in case of a breach of any condition hereof, the above-entitled Court may, upon notice to the Surety of not less than ten (10) days, proceed summarily in the above-entitled action in which this bond is given, to ascertain the amount which the Surety is bound to pay on account of such breach and render judgment therefor against the Surety and award execution therefor, all as provided by and in accordance with the intent and meaning of rule 34 of the Rule of Practice of the United States District Court in and for the Northern District of California.

In Witness Whereof, the corporate seal and name of the said Surety Company, is hereto affixed and attested at San Francisco, California, by its duly authorized officer, this 28th day of January, 1954.

[Seal] MARYLAND CASUALTY COMPANY,

By /s/ D. S. ARMSTRONG,
Attorney-in-Fact.

The premium on this bond is $10.00 per annum.

State of California,
City and County of San Francisco—ss.

On this 28th day of January, 1954, before me, A. McClintock, a Notary Public in and for the City and County of San Francisco, personally appeared

D. S. Armstrong, known to me to be the Attorney-in-Fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my Office in the City and County of San Francisco the day and year in this Certificate first above written.

[Seal] /s/ A. McCLINTOCK,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires January 12th, 1957.

[Endorsed]: Filed January 29, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Petition for Writ of Habeas Corpus.

Order Denying Petition for Writ of Habeas Corpus.

Notice of Appeal.

Cost Bond on Appeal.

Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of February, 1954.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14252. United States Court of Appeals for the Ninth Circuit. Leng May Ma, Appellant, vs. Bruce G. Barber, District Director, Immigration and Naturalization, Appellee. Transcript of Record. Appeal From the United States District Court for the Northern District of California, Southern Division.

Filed: February 24, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[fol. 13] Minute entry of argument and submission—January 24, 1957 (omitted in printing).

[fol. 14] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—February 5, 1957

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 15] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,252

LENG MAY MA, Appellant,

v.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco District, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

OPINION—February 5, 1957

Before: Healy, Bone, and Lemmon, Circuit Judges

HEALY, Circuit Judge

This is an appeal from the denial by the court below of a petition for the writ of habeas corpus seeking a stay of deportation.

Petitioner is a native of China. She claimed acquisition of United States citizenship at birth on the statutory ground that her father was a United States citizen. She arrived in this country in 1951, and was by the Immigration Service accorded hearings on her claim but failed to establish her identity as a United States national to the satisfaction of the Service. Thereupon she was ordered to surrender for deportation to China. She petitioned the Service for a stay on the ground that she would be subjected to physical persecution and probable death if she were to return to China, seeking this relief on the basis of § 243(h) of the Immigration and Nationality Act of 1952 (8 USCA § 1253(h)), reading as follows:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to [fol. 16] any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

The Service notified petitioner that no stay of deportation could be granted her inasmuch as aliens excluded from the United States are not eligible for relief under the above statute. She then brought this proceeding in habeas corpus.

The question for decision is whether an alien seeking admission to the United States is "within the United States" after his application for such admission has been decided against him. This court has recently held the contrary, stating that the status of such "person released by the immigration authorities on bond is still that of a person without the United States seeking admission." *Jew Sing* v. *Barber*, 215 F. 2d 906, 907 (1954), cert. granted 348 U. S. 910, judgment vacated for mootness 350 U. S. 898 (1955).

Some doubt is cast on our holding in *Jew Sing* because of the granting by the Supreme Court of certiorari therein, notwithstanding the subsequent vacation for mootness of this court's judgment. However, *Jew Sing* appears to us a much weaker case from the government's standpoint than that of the petitioner here. It appears that Jew Sing had resided continuously in the United States from 1921 until

1947, when he made a visit to China, returning to this country a few months later. He was refused admission and ordered deported, but was then paroled by the Service under bond to afford him an opportunity to petition for naturalization as an honorably discharged veteran of World War II. In the case now before us the petitioner had had no prior residence here. During her entire stay in this country she was enlarged only at the sufferance of the Immigration Service.

Considering all circumstances we are persuaded that the denial by the trial court of the writ of habeas corpus was not error, and its order is accordingly affirmed.

[File endorsement omitted]

[fol. 17] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14252

LENG MAY MA, Appellant,

v.

BRUCE G. BARBER, District Director, Immigration and Naturalization, Appellee.

JUDGMENT—Entered February 5, 1957

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[fol. 18] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 19] SUPREME COURT OF THE UNITED STATES
No. 916, October Term, 1956

[Title omitted]

ORDER ALLOWING CERTIORARI—June 3, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Section 237, supra, nor "immediately deported," it is obvious that by statutory language that section is not applicable.

Section 243 of the Immigration and Nationality Act specifically provides for the deportation of any alien whether his removal be under the provisions of the Immigration and Nationality Act "*or any other Act.*" Deportation of an alien excluded by a Board of Special Inquiry convened pursuant to the provisions of Section 17 of the Immigration Act of 1917 (8 U.S.C. 153) is subject to removal and deportation at this date under the provisions of Section 243, supra.

The Court below by its opinion concludes that certain aliens deportable under Section 243(a) of the Immigration and Nationality Act are not eligible for relief under the provisions of subparagraph (h) of the same section of law.

4. The Court of Appeals for the District of Columbia in *Lim Fong, et al., v. Brownell,* 215 F.2d 683, 684, decided July 22, 1954, in part held:

> "* * * here deportability is conceded and the only attack is upon the Attorney General's decision that appellants should be deported to Continental China, * * *"
>
> "* * * the question is whether the complaint states a case for a preliminary injunction. It alleges in substance that appellee, acting through his agents, arbitrarily and contrary to law has determined that claims of persecution made by Chinese aliens and filed pursuant to Section 243 (h) of the Immigration and Nationality Act shall not be honored, and that in so determining he

has refused to exercise his statutory discretion, which if exercised might result in appellants being permitted to remain in the United States. These allegations, taken as true in the absence of denial or responsive pleading, obviously state a case for injunctive relief against alleged imminent deportation to Continental China."

To test the legality of administrative orders sending Chinese aliens to Communist China, five lawsuits, involving some fifty aliens, were filed in the District Court for the District of Columbia. (*Chu v. Brownell,* Civil Action No. 840-54; *Ning v. Brownell,* Civil Action No. 1479-54; *Fun v. Brownell,* Civil Action No. 2184-54; *Fon v. Brownell,* Civil Action No. 2179-54, and *Lim Fong v. Brownell,* supra.)

To prevent abuse of the Attorney General's extraordinary powers over the lives and destinies of our foreign born, judicial intervention is appropriate herein. The decision of the Court below, contrary to the decision of the Court of Appeals for the District of Columbia, held that judicial review was not available.

5. The decision below is in direct conflict with the mandate of 28 U.S.C. 2243, which requires that an application for a writ should be signed or entertained "unless it appear from the application that the application or person detained is not entitled thereto."

The petition was the only pleading filed in this cause. No writ or order to show cause was issued and no hearing was held. The petition charges ad-

ministrative abuse of discretion and error of law. The averments of the petition must be treated as true. *House v. Mayo,* 324 U.S. 42.

Immigration administrative decisions are subject to judicial review where the proceedings have not conformed to the traditional standards of fairness required by the due process of law clause of the Fifth Amendment to the Constitution of the United States. *Japanese Immigrant Case,* 189 U.S. 86; *Vajtauer v. Commissioner of Immigration,* 273 U.S. 103; *Wong Yang Sung v. McGrath,* 339 U.S. 33; *Kwong Hai Chew v. Colding,* 334 U.S. 590. Or where there has been arbitrariness or abuse of discretion by the administrative agency. *Low Wah Suey v. Backus,* 225 U.S. 460; *Kwock Jan Fat v. White,* 253 U.S. 454 (1920); *Carlson v. Landon,* 342 U.S. 524 (1950); *Yaris v. Esperdy,* 202 F.2d 109, 112 (2 Cir., 1953). The same general rule applies where the administrative authority commits an error of law. *Gegiow v. Uhl,* 239 U.S. 3 (1915); *Kessler v. Stecker,* 307 U.S. 22 (1939); *Bridges v. Wixon,* 326 U.S. 135 (1945); *Fong Haw Tan v. Phelan,* 333 U.S. 6 (1948); *McGrath v. Kristensen,* 340 U.S. 162 (1950).

In *Price v. Johnston,* 334 U.S. 266, 291 (1948), this Court observed:

> "Appellate Courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed."

To the same effect, as to requirements of a hearing on disputed facts, are *Walker v. Johnston,* 312 U.S. 275, 285, 287 (1941); *Holiday v. Johnston,* 313 U.S.

Office Supreme Court, U.S.
FILED
APR 17 1957
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. ~~915~~ 105

LENG MAY MA,
Petitioner,
vs.
BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco District,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI

JOSEPH S. HERTOGS,
[illegible] Washington Street, San Francisco 11, California,
Attorney for Petitioner.

342, 350 (1941); *Waley v. Johnston*, 316 U.S. 101 (1942); *Cochrane v. Kansas*, 316 U.S. 255 (1942); *Stewart v. Overholzer*, 186 F.2d 339, 342 (C.A.D.C., 1950). This doctrine applies even though the Court might consider the allegations improbable or incapable of proof. *Holiday v. Johnston*, supra; *Waley v. Johnston*, supra.

In *U.S. v. Shaughnessy*, 205 F.2d 238, 240 (2 Cir., 1953) the Court held that the factual question—entrant alien or assimilated resident alien—could only be determined after a hearing on that issue.

The Court below, contrary to these decisions, refused to accept the affirmative allegations and without hearing dismissed the petition. Because of this conflict, it is submitted that certiorari is appropriate.

CONCLUSIONS.

Any delegated executive power is subject to conformance with the due process clause of the Fifth Amendment. *Ex parte Endo*, 323 U.S. 283. Any exercise of discretion must be consistent "with fundamental principles of justice embraced within the conception of the due process of law". *Tang Tung v. Edsell*, 223 U.S. 673; *Joint Fascist Refugee Comm. v. McGrath*, 341 U.S. 123; *Carlson v. Landon*, 342 U.S. 524.

Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness en-

compassed in due process of law. *Japanese Immigrant Case (Yamataya v. Fisher),* 189 U.S. 86, 100, 101; *Wong Yang Sung v. McGrath,* 339 U.S. 33, 49, 50.

Acceptance of the decision below would "inject into our system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute". *Stack v. Boyle,* 342 U.S. 1. Likewise, acceptance of the mandate of the administrative agency would condemn the petitioner herein to probable death or submission to principles to which she cannot adhere. It is contradictory to our American system of government to force a person so situated to accept a minor official's ultimatum without any opportunity to be heard.

For the reasons set forth, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
April 12, 1957.

JOSEPH S. HERTOGS,
Attorney for Petitioner.

(Appendices A, B and C Follow.)

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Appendix A

DECISION OF COURT OF APPEALS, IN RE LENG MAY MA.

United States Court of Appeals
For the Ninth Circuit

Leng May Ma, Appellant, vs. Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco District, Appellee.	No. 14,252 Feb. 5, 1957

Appeal from the United States District Court
For the Northern District of California,
Southern Division.

Before: Healy, Bone, and Lemmon, Circuit Judges

Healy, Circuit Judge

This is an appeal from the denial by the court below of a petition for the writ of habeas corpus seeking a stay of deportation.

Petitioner is a native of China. She claimed acquisition of United States citizenship at birth on the statutory ground that her father was a United States citizen. She arrived in this country in 1951, and was

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In the Supreme Court
OF THE
United States

October Term, 1956

No.

LENG MAY MA,
Petitioner,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco District,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Leng May Ma, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the lower Court's dismissal of a petition for a writ of habeas corpus filed in behalf of your petitioner.

OPINIONS BELOW.

The decision of the Immigration and Naturalization Service refusing to consider petitioner's application for a stay of deportation is printed in the record, pp. 7-8. The order of the District Court (without opinion) dismissing the petition for a writ of habeas corpus is printed at page 8 in the record. The opinion of the Court of Appeals has not yet been officially reported, but it is printed in Appendix A hereto.

JURISDICTION.

The judgment of the Court of Appeals was filed and entered on February 5, 1957, Appendix A hereto. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Is an excluded alien who has been physically present in the United States on parole for almost six years entitled to a stay of deportation on physical persecution grounds filed pursuant to the provisions of Section 243(h) of the Immigration and Nationality Act?

2. Does a petition for a writ of habeas corpus state a cause of action where it alleges administrative abuse of discretion and error of law?

STATUTES INVOLVED.

28 U.S.C. 2243 provides in part:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. * * *"

Section 243 of the Immigration and Nationality Act of 1952 (66 Stat. 212, 8 U.S.C. 1253) provides in part as follows:

> "(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

Sections 237(a), (b) and 243(a), (h) (8 U.S.C. 1227(a), (b), and 1253(a), (h)) of the Immigration and Nationality Act, Section 18 (8 U.S.C. 154) of the Act of February 5, 1917, and Section 20 (8 U.S.C. 156) of the Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, are set forth in Appendix C hereto, infra, pp. viii-xii.

Title 8 U.S.C.A. 1253.

> "Withholding of deportation.
>
> (h) The Attorney General is authorized to withhold deportation of any alien within the

United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason. June 27, 1952, c. 477, Title II, ch. 5, Sec. 243, 66 Stat. 212."

STATEMENT OF THE CASE.

Appellant was born in China in August of 1938. She claims to have acquired United States citizenship at the time of birth, pursuant to the provisions of Section 1993, United States Revised Statutes, as amended by the Act of May 26, 1934. After issuance of a travel affidavit by the American Consulate General at Hong Kong, on March 22, 1951, the appellant proceeded to the United States, arriving at the Port of San Francisco, California, on May 4, 1951. After extensive hearings conducted by the Immigration and Naturalization Service, it was concluded that the appellant had failed to establish her claim. The decision of the Immigration and Naturalization Service was affirmed by the Board of Immigration Appeals on December 3, 1953.

Pursuant to a demand directed to appellant by the San Francisco District Office of the Immigration and Naturalization Service, she surrendered for contemplated deportation to Communist China on or about January 15, 1954. Under date of January 18, 1954, there was submitted on behalf of appellant to the District Director, Immigration and Naturalization Service, San Francisco, California, in accordance with pre-

scribed regulations, an application for a stay of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act of 1952. On January 21, 1954, the San Francisco Office of the Immigration and Naturalization Service advised counsel for appellant that the appellant was not eligible for the relief requested (Exhibit A, attached to the petition; T. 7).

At the time the petition for writ of habeas corpus was filed in the case at bar, deportation to Communist China was imminent. In the petition it was alleged that the appellant was denied due process of law, that her deportation to Communist China was contrary to law and the expression of Congress not to deport a person to a country where such person would suffer physical persecution and that the decision of the Immigration and Naturalization Service rejecting the application for stay of deportation was an abuse of discretion.

REASONS FOR GRANTING CERTIORARI.

This writ of certiorari is sought because the issues presented herein raise important questions of federal pleading and practice, as well as important questions pertaining to the administration of the immigration and nationality laws of the United States. In addition, the decision below is in conflict with decisions of this Court and contrary to decisions of other circuits.

1. Certiorari was previously granted by this Court in a similar case presenting the same issue—whether

an excluded alien is a person residing within the United States within the meaning of Section 243(h) of the Immigration and Nationality Act—*Jew Sing v. Barber,* 215 F.2d 906, cert. granted 348 U.S. 910, judgment vacated for mootness 350 U.S. 898.

2. The decision below accepted as an established fact that the petitioner is not a resident of the United States.

It was stated by this Court in *Savorgnan v. United States,* 338 U.S. 491, 505:

> "the actual 'place of general abode' is the sole test for determining residence."

The term residence means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact. Section 101(a) (33), Immigration and Nationality Act; 66 Stat. 170; 8 U.S.C. 1101(a) (33).

The Fifth Amendment provides without qualification that no person shall "be deprived of life, liberty, or property, without due process of law." It is not confined solely to the protection of citizens but as this Court has stated: "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins,* 118 U.S. 356, 369. This protection extends to all whose presence brings them within reach of the judicial and administrative processes of our governmental bodies. *U.S. v. Pink,* 315 U.S. 203, 228.

The decision of the Court of Appeals holding that an alien physically residing in the United States and

subject to the jurisdiction thereof is not within the United States presents an important question which should be determined by this Court.

3. The decision of the Court below follows their earlier determination of the same issue in *Jew Sing v. Barber,* 215 U.S. 906. (Appendix B, infra, pp. v-vii.) In *Jew Sing v. Barber,* the Court below sought to distinguish the decision of the Court of Appeals for the District of Columbia in *Ng Lin Chong v. McGrath,* 202 F.2d 316 (1952). The Court of Appeals in *Ng Lin Chong v. McGrath,* supra, held:

> "We conclude that whenever the Attorney General chooses to delay deportation as long as he did in these cases for the purpose of prosecuting an alien who is subject to 'immediate deportation,' he cannot thereafter proceed to deport that alien under Sec. 18 since immediacy required for its application no longer exists. In that event, the procedures outlined in amended Sec. 20 must be used."

(For Sections 18 and 20, see App. C.).

Section 18 of the Immigration Act of 1917 was superseded by Section 237 of the Immigration and Nationality Act (66 Stat. 201; 8 U.S.C. 1227) (App. C). Section 20 of the Immigration Act of 1917 was superseded by Section 243 of the Immigration and Nationality Act (66 Stat. 212; 8 U.S.C. 1253) (App. C, infra).

Section 237 of the Immigration and Nationality Act provides for the deportation of an alien "who is excluded under *this* Act" and who is "immediately deported to the country whence he came." When an alien is neither excluded under the provisions of

by the Immigration Service accorded hearings on her claim but failed to establish her identity as a United States national to the satisfaction of the Service. Thereupon she was ordered to surrender for deportation to China. She petitioned the Service for a stay on the ground that she would be subjected to physical persecution and probable death if she were to return to China, seeking this relief on the basis of §243(h) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. §1253(h)), reading as follows:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

The Service notified petitioner that no stay of deportation could be granted her inasmuch as aliens excluded from the United States are not eligible for relief under the above statute. She then brought this proceeding in habeas corpus.

The question for decision is whether an alien seeking admission to the United States is "within the United States" after his application for such admission has been decided against him. This court has recently held the contrary, stating that the status of such "person released by the immigration authorities on bond is still that of a person without the United States seeking admission." Jew Sing v. Barber, 215 F.2d 906, 907 (1954), cert. granted 348

U.S. 910, judgment vacated for mootness 350 U.S. 898 (1955).

Some doubt is cast on our holding in *Jew Sing* because of the granting by the Supreme Court of certiorari therein, notwithstanding the subsequent vacation for mootness of this court's judgment. However, *Jew Sing* appears to us a much weaker case from the government's standpoint than that of the petitioner here. It appears that Jew Sing had resided continuously in the United States from 1921 until 1947, when he made a visit to China, returning to this country a few months later. He was refused admission and ordered deported, but was then paroled by the Service under bond to afford him an opportunity to petition for naturalization as an honorably discharged veteran of World War II. In the case now before us the petitioner had had no prior residence here. During her entire stay in this country she was enlarged only at the sufferance of the Immigration Service.

Considering all circumstances we are persuaded that the denial by the trial court of the writ of habeas corpus was not error, and its order is accordingly affirmed.

(Endorsed:) Opinion. Filed Feb. 5, 1957.
Paul P. O'Brien, Clerk.

United States Court of Appeals
For the Ninth Circuit

Leng May Ma Appellant, vs. Bruce G. Barber, District Director, Immigration and Naturalization, Appellee.	No. 14252

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed) Judgment.

Filed and Entered: February 5, 1957.
Paul P. O'Brien, Clerk.

Appendix B

DECISION OF COURT OF APPEALS, IN RE JEW SING.

United States Court of Appeals
For the Ninth Circuit

Jew Sing, Appellant, vs. Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco District, Appellee.	No. 14,146 Sep. 8, 1954

Appeal from the United States District Court for the Northern District of California.

Before: Denman, Chief Judge, and Bone and Orr, Circuit Judges.

Denman, Chief Judge:

Jew Sing appeals from a decision of the district court denying without hearing his application to be released from the custody of Bruce G. Barber, acting as District Director of the San Francisco Immigration and Naturalization Service, hereafter Director Barber.

The application alleges that Jew Sing on October 14, 1947, arrived at the Port of San Francisco and then claimed admission as a native-born American

citizen. His claim to be admitted was considered in exclusion proceedings during which he was released under bond. The proceedings were decided against him and after a delay of over six years he was notified on November 3, 1953, to surrender himself to Director Barber to be excluded by deportation as soon as travel accommodations could be provided. He is now in Director Barber's custody.

Prior to this, in September, 1953, Jew Sing filed an application for a stay of deportation under the provisions of 8 C.F.R. 243.3(h) (8 U.S.C.A. 1253(h)), alleging that deportation to China would subject him to physical persecution. The appellant was advised by the Immigration and Naturalization Service that Section 243(h) did not apply to his case.

Section 243(h), Immigration and Nationality Act (8 U.S.C.A. 1253(h)) provides:

> "The Attorney General is authorized to withhold deportation of *any alien within the United States* to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason." (Emphasis supplied.)

The question is whether an alien seeking admission to the United States is "within the United States" while his application for such admission is under consideration and after it has been decided against him. We think not. His status as a person released by the immigration authorities on bond is still that of a person without the United States seeking admission. Kaplan v. Tod, 267 U.S. 228; United States v.

Spar, 149 F.2d 881 (Cir. 2); United States v. Corsi, 65 F.2d 322 (Cir. 2).

Jew Sing contends that the case of Ng Ling Chong v. McGrath, 202 F.2d 316, 317 (C.A., D.C.) holds the contrary. We do not agree. The Act there controlling the Attorney General, § 20 of 39 Stats. 874, 890, as amended 8 U.S.C.A., § 156 reads:

> "No alien shall be deported under any provisions of this chapter to any country in which the Attorney General shall find that such alien would be subjected to physical persecution."

This earlier § 20 provision contains no limitation to aliens other than those "within the United States" of the now applicable act. We are required to give effect and not make nugatory such significant changes in statutory provisions. United States v. Bashaw, 50 Fed. 749, 753; 754 (Cir. 8).

The judgment is affirmed.

(Endorsed:) Opinion. Filed Sep. 8, 1954. Paul P. O'Brien, Clerk.

Appendix C

Section 18—Act of February 5, 1917, 8 U.S.C.A. 154.

"Immediate deportation of aliens brought in in violation of law; cost of maintenance and return.

All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which they respectively came. It shall be unlawful for any master purser, person in charge, agent, owner, or consignee of any such vessel to refuse to receive back on board thereof, or on board any other vessel owned or operated by the same interests, such aliens; or to fail to detain them thereon; or to refuse or fail to return them in the manner aforesaid to the foreign port from which they came; or to fail to pay the

Section 237, Immigration and Nationality Act, 8 U.S.C.A. 1227.

"Immediate deportation of aliens excluded from admission or entering in violation of law —maintenance expenses.

(a) Any alien (other than an alien crewman) arriving in the United States who is excluded under this chapter, shall be immediately deported to the country whence he came, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper. The cost of the maintenance including detention expenses and expenses incident to detention of any such alien while he is being detained, as well as the transportation expense of his deportation from the United States, shall be borne by the owner or owners of the vessel or aircraft on which he arrived, except • • •

Unlawful practice of transportation lines.

(b) It shall be unlawful for any master, commanding offi-

cost of their maintenance while on land; or to make any charge for the return of any such alien, or to take any security for the payment of such charge; or to take any consideration to be returned in case the alien is landed; • • •"

cer, purser, person in charge, agent, owner, or consignee of any vessel or aircraft (1) to refuse to receive any alien (other than an alien crewman), ordered deported under this section back on board such vessel or aircraft or another vessel or aircraft owned or operated by the same interests; (2) to fail to detain any alien (other than an alien crewman) on board any such vessel or at the airport of arrival of the aircraft when required by this chapter or if so ordered by an immigration officer, or to fail or refuse to deliver him for medical or other inspection, or for further medical or other inspection, as and when so ordered by such officer; (3) to refuse or fail to remove him from the United States to the country whence he came; (4) to fail to pay the cost of his maintenance while being detained as required by this section or section 1223 of this title; (5) to take any fee, deposit, or consideration on a contingent basis to *ke*[1] kept or returned in case the alien is landed or excluded; • • •"

---

[1]So in original. Probably should read "be".

Section 20, Act of February 5, 1917, 8 U.S.C.A. 156.

"Ports to which aliens to be deported, cost of deportation.

The deportation of aliens provided for in this chapter shall, at the option of the Attorney General, be to the country whence they came or to the foreign port at which such aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such territory; or, if such aliens entered foreign contiguous territory from the United States and later entered the United States, or, if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their reentry, or imposes any condition upon permitting reentry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States.

* * *"

Section 23 of the Internal Security Act of 1950 (Public Law 831, 81st Cong., 2d Sess.; 64 Stat.) 8 U.S.C.A. 156, amended Section 20 of the Immigration Act of February 5, 1917 so as to read, in pertinent part, as follows:

"Sec. 20(a) That the deportation of aliens provided for in this Act and all other immigration laws of the United States shall be directed by the Attorney General to the country specified by the alien, if it is willing to accept him into its territory; otherwise such deportation shall be directed by the Attorney General within his discretion and without priority of preference because of their order as herein set forth, either to the country from which such alien last entered the United States or to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory; or to any country in which he resided prior to entering the country from which he entered the United States or to the country which had sovereignty over the birthplace of the alien at the time of his birth; or to any coun-

Section 243 of the Immigration and Nationality Act, 8 U.S.C.A. (effective December 24, 1952).

"Countries to which aliens shall be deported—Acceptance by designated country; deportation upon nonacceptance by country.

(a). The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. • • • Thereupon deportation of such alien shall be directed to any country of which such alien is a subject[1] national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particu-

[1]So in original. Probably should read with a ",".

Act of February 5, 1917 (8 U.S.C. 156) to read as follows:

> "SEC. 20(a). That the deportation of aliens provided for in this Act and all other immigration laws of the United States shall be directed by the Attorney General to the country specified by the alien, if it is willing to accept him into its territory; otherwise such deportation shall be directed by the Attorney General within his discretion and without priority of preference because of their order as herein set forth, either to the country from which such alien last entered the United States or to the country in which such alien embarked for the United States or for foreign contiguous territory; or to any country in which he resided prior to entering the country from which he entered the United States or to the country which had sovereignty over the birthplace of the alien at the time of his birth; or to any country of which such alien is a subject, national, or citizen; or to the country in which he was born; or to the country in which the place of his birth is situated at the time he is ordered deported; or, if deportation to any of the said foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory. . . . No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution."

Section 212(d)(5) of the Immigration and Nationality Act of 1952 (66 Stat. 188, 8 U.S.C. 1182(d)(5)) reads as follows:

try of which such an alien is a subject, national, or citizen; or to the country in which he was born; or to the country in which the place of his birth is situated at the time he is ordered deported; or, if deportation to any of the said foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory. * * * No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution."

lar case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either— * * *.

Withholding of deportation.

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

"The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served, the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

Section 237 of the Immigration and Nationality Act of 1952 (66 Stat. 201; 8 U.S.C. 1227) reads as follows:

"Immediate deportation of aliens excluded from admission or entering in violation of law—Maintenance expenses.

(a) Any alien (other than an alien crewman) arriving in the United States who is excluded under this chapter, shall be immediately deported to the country whence he came, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper. The cost of the maintenance including detention expenses and expenses incident to detention of any such alien while he is being detained, as well as the transportation expense of his deportation from the United States, shall be borne by the owner or owners of the vessel or aircraft on which he arrived, . . ."

Section 243 of the Immigration and Nationality Act of 1952 (66 Stat. 212; 8 U.S.C. 1253) provides as follows:

"Countries to which aliens shall be deported—Acceptance by designated country; deportation upon nonacceptance by country.

(a) The deportation of any alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. . . Thereupon deportation of such alien shall be directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—— . . . Withholding of deportation.

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

Section 405(a) of the Immigration and Nationality Act of 1952 (66 Stat. 280, 8 U.S.C. 1101 Note) provides in part:

> "Sec. 405(a). Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes (statuses), conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act, are, unless otherwise specifically provided therein, hereby continued in force and effect."

8 Code of Federal Regulations 237.1 (1952 Ed.) provides:

> "Sec. 237.1. *Stay of deportation of excluded alien.* The immediate deportation of an excluded alien as provided in Section 237(a) of the Immigration and Nationality Act may be stayed in the discretion of district directors, upon a determination that immediate deportation is not practicable or proper, or that the alien's testimony is necessary in behalf of the United States as provided in Section 237(d) of that Act."

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JOHN T. FEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 105

LENG MAY MA,

Petitioner,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco District,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

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Section 405(a) (66 Stat. 280, 8 U.S.C. 1101) 7, 24

Internal Security Act of 1950 (64 Stat. 1010), Section 23 .. 3

Nationality Act of 1940 (54 Stat. 1138, 8 U.S.C.A. 601), Section 201 8

United States Revised Statutes, as amended by the Act of 1934 (48 Stat. 797; 8 U.S.C.A. 6), Section 1993 8

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28 U.S.C.A., Section 1254(1) 2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 105

LENG MAY MA,
Petitioner,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco District,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The decision of the Immigration and Naturalization Service refusing to consider petitioner's application for a stay of deportation is printed in the record on pages 7 and 8. The order of the District Court (with-

out opinion) dismissing the petition for writ of habeas corpus is printed in the record (R. 8). The opinion of the Court of Appeals (R. 13-15) is reported at 241 F.2d 85.

JURISDICTION.

The judgment of the Court of Appeals was entered February 5, 1957 (R. 15). A petition for writ of certiorari was filed on April 17, 1957. Certiorari was granted on June 3, 1957 (R. 16). The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED.

1. Is an excluded alien who has been physically present in the United States on parole for more than three years entitled to a hearing to prevent deportation to Communist China on an application for stay of deportation on physical persecution grounds, filed pursuant to the provisions of Section 243(h) of the Immigration and Nationality Act.

2. Does the Constitutional right of due process extend to an excluded alien on parole.

3. Does a petition for a writ of habeas corpus state a cause of action where it alleged administrative abuse of discretion and error of law.

STATUTES INVOLVED.

Section 18 of the Immigration Act of February 5, 1917 (39 Stat. 887; 45 Stat. 1551; 54 Stat. 1238; 8 U.S.C. 154), provides as follows:

> "Immediate deportation of aliens brought in in violation of law; cost of maintenance and return.
>
> All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which they respectively came. It shall be unlawful for any master, purser, person in charge, agent, owner, or consignee of any such vessel to refuse to receive back on board thereof, or on board any other vessel owned or operated by the same interests, such aliens; or to fail to detain them thereon; or to refuse or fail to return them in the manner aforesaid to the foreign port from which they came; or to fail to pay the cost of their maintenance while on land; or to make any charge for the return of any such alien, or to take any security for the payment of such charge; or to take any consideration to be returned in case the alien is landed; * * *"

Section 23 of the Internal Security Act of 1950 (64 Stat. 1019) amended section 20 of the Immigration

STATEMENT OF THE CASE.

Petitioner was born in China in August of 1938. She claims to have acquired United States citizenship at the time of birth, pursuant to the provisions of Section 1993, United States Revised Statutes, as amended by the Act of May 24, 1934. (48 Stat. 797; 8 U.S.C.A. 6[1].) After issuance of a travel affidavit by the American Consulate General at Hong Kong, on March 22, 1951, the petitioner proceeded to the United States, arriving at the Port of San Francisco, California, on May 4, 1951. After extensive hearings conducted by the Immigration and Naturalization Service, it was concluded that the petitioner had failed to establish her claim. The decision of the Immigration and Naturalization Service was affirmed by the Board of Immigration Appeals on December 3, 1953.

Pursuant to a demand directed to petitioner by the San Francisco District Office of the Immigration and Naturalization Service, she surrendered for contemplated deportation to Communist China on or about January 15, 1954. Under date of January 18, 1954, there was submitted on behalf of petitioner to the District Director, Immigration and Naturalization Service, San Francisco, California, in accordance with prescribed regulations, an application for a stay of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act of 1952. On January 21, 1954, the San Francisco Office of the

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[1]Subsequently superseded by Section 201 of the Nationality Act of 1940, 54 Stat. 1138, 8 U.S.C.A. 601, and Section 301 of the Immigration and Nationality Act of 1952, 66 Stat. 235; 8 U.S.C.A. 1401.

Immigration and Naturalization Service advised counsel for petitioner that the appellant was not eligible for the relief requested. (R. 7-8.)

At the time the petition for writ of habeas corpus was filed in the case at bar, deportation to Communist China was imminent. In the petition it was alleged that the petitioner was denied due process of law, that her deportation to Communist China was contrary to law and the expression of Congress not to deport a person to a country where such person would suffer physical persecution and that the decision of the Immigration and Naturalization Service rejecting the application for stay of deportation was an abuse of discretion.

SUMMARY OF ARGUMENT.

A. The refusal of the Immigration and Naturalization Service to give any consideration to the application filed by petitioner seeking a stay of deportation on physical persecution grounds was contrary to law; that the action of the Service was based upon an erroneous interpretation of the statute; and that the petitioner is one entitled to the relief afforded by the provisions of Section 1253(h), Title 8, U.S.C.A.

B. The petition for writ of habeas corpus alleges sufficient facts to state a cause of action. The petition charges administrative abuse of discretion and error of law. It was improper to dismiss such application without a hearing on the issues presented therein.

ARGUMENT.

THE DECISION OF THE IMMIGRATION AND NATURALIZATION SERVICE REJECTING PETITIONER'S APPLICATION FOR A STAY OF DEPORTATION ON PHYSICAL PERSECUTION GROUNDS IS CLEARLY ERRONEOUS.

It is the position of the petitioner that she is entitled as a matter of law to have her application for a stay of deportation considered by the Attorney General of the United States in conformity with the statutory provisions of Section 243(h) of the Immigration and Nationality Act. (66 Stat. 212; 8 U.S.C.A. 1253(h).) The contemplated deportation of the petitioner, or of any alien, to Communist China, a country dominated by a political organization opposed to our democratic processes, contravenes the ideals and established principles of this nation.

Petitioner filed with the appropriate office of the Immigration and Naturalization Service her verified application, in accordance with applicable regulations, praying for a stay of deportation on the ground that she would be subject to physical persecution and probable death, if deported to Communist China. (R. 5.) The Immigration and Naturalization Service, through the office of the District Director, San Francisco District, held that petitioner is not a person entitled to file an application for relief under the provisions of Section 243(h) of the Immigration and Nationality Act. Accordingly, the beneficial provisions of that part were denied this petitioner without hearing.

I.

HISTORICAL BACKGROUND.

In *United States v. Shaughnessy*, 234 F.2d 715, 718, Judge Frank said:

> "The Supreme Court has taken judicial notice of the date the yachting season ends in our northern waters. See: *The Conqueror*, 166 U.S. 110, 134. Surely the cruel habits of the Chinese Communist Government are not less notorious."

Accordingly, we call attention to the historical background of this litigation. This background should be judicially noticed or could be the subject of evidence at a trial herein.

(A) Deportations to Communist China, 1949-1953.

The People's Republic of Communist China was proclaimed in Peiping on September 21, 1949. (The World Almanac, 1953, p. 344.) Since that date and until 1953 no attempt was made to send Chinese aliens back to Communist China against their will.

It is a matter of common knowledge that China has been wholly overrun by the armed forces of the Chinese Communists; that the recognized government of the Republic of China fled to Formosa; that the principles of the Chinese Communist Government are contradictory to the principles of free and democratic government; and that the Communists have engaged in a campaign of mass murder of Chinese for vaguely defined "crimes", and that the Communist press in China, itself, puts the number of executions in excess

of a million.[2] It is equally common knowledge that the Communists are ruling China by mass murder.[3]

On January 26, 1954, before the House Appropriations Committee Walter S. Robertson, Assistant Secretary of State for Far Eastern Affairs, testified that Red Chinese slaughtered about fifteen million of their own people since 1949 which showed "just about the bloodiest pattern that the Communists have followed in any country in the world." (Department of State, Justice and Commerce, House Appropriation Hearings, 83rd Congress, 2nd Session, p. 122.)

The United Nations, through the persistent efforts of the United States, refused for a period of approximately two years to mediate the Korean situation unless all parties agreed that captured Chinese Communist soldiers would not be repatriated to Communist

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[2] "Reds Digesting China", by Marguerite Higgins, Washington Post, October 1, 1951.

[3] "They're Ruling China by Mass Murder", Saturday Evening Post, October 13, 1951, page 31; at page 167, the author points out that under the most intense suspicion, and consequent danger of extermination, are Chinese "individuals who once worked for or associated with Europeans, *particularly Americans*", and that "in a majority of cases Chinese are arrested not because they commit some overt act against the state, but because they belong to classes or categories distrusted by the communists and suspected of harboring dangerous (unorthodox) thoughts. They are sources of *potential* opposition to the regime." (Emphasis supplied.)

The United Nations General Assembly was informed November 12, 1951, that there would be no lasting peace with Red China, in Korea, or elsewhere, so long as China is dominated by "the Communist rule of mass murder"—Washington Times-Herald, November 13, 1951, page 1. Dr. T. F. Tsiang, the Chinese representative before the U. N. General Assembly, stated official announcements by Chinese Communist authorities admitted that 1,176,000 so-called counter-revolutionaries had been liquidated from October 1, 1949 to October 1, 1950, in the provinces of China, including that from which appellant originally came.

China against their wishes. (During this period, this nation alone sustained 25,000 casualties.)

Return of any individual, despite his opposition to a Communist-dominated country, would be flatly inconsistent with the principles adhered to in the Korean prisoner of war negotiations. Deportation of this petitioner to Communist tyranny would stultify our national policy of protecting those who have fled Communist oppression and make mockery of our national efforts to win over world opinion for the cause of freedom.

Indeed, on November 7, 1950, the Immigration Service officially recognized that a Chinese alien who was anti-communist would be subject to physical persecution if returned to Communist China. In a decision, known as *Matter of T—C—*, Interim Decision No. 212, decided on that date, it was held that an anti-communist Chinese alien was eligible as a displaced person under 50 App. U.S.C. 1953 (The Displaced Persons Act) because he properly feared persecution if returned to China. The Immigration Service ruled:

> "In summation, then, it will be concluded that the de facto Government of China is Communistic, and as Communistic as the Government of Russia and the countries behind the Iron Curtain."
>
> * * * *
>
> "Fear to Return: The applicant's testimony above relative to displacement based upon his fear of persecution will be utilized to establish that other cardinal eligibility requisite, namely, that the applicant is unable to return to the country of his birth, nationality, or last residence, because of

persecution on account of his race, religion or political opinions. His testimony with respect to his opposition to Communism, and the acknowledgment that China is at this time a Communist-dominated country establishes that the applicant is unable to return to China because of his fear of persecution on account of his political opinions."

(B) Deportations to Communist China, 1953-1956.

On June 18, 1953, the first attempt was made by the Department of Justice to deport aliens to Communist China. On that date it was announced in an official Press Release that:

"Attorney General Herbert Brownell, Jr. said today that 55 Chinese have been detained for deportation.

He said that those *desiring* to return to their mainland homes and not raising a claim of physical persecution at the hands of Chinese Communists will actually be deported."

Claims of physical persecution were raised by many if not all of the 55. They were not deported, but were thereafter released by the Immigration Service on bond or parole. No further action was taken until the early part of 1954 when the policy changed. For the first time claims of physical persecution were no longer honored. Aliens who had served honorably in our Army (See *Jew Sing v. Barber*, 215 F.2d 906 (C.A. 9, 1954), cert. granted 348 U.S. 910, judgment vacated as moot after petitioner's naturalization, 350 U.S. 898), aliens who have been here twenty or more years

and others who are declared anti-Communists and whose love for democracy is unquestioned, were called in for deportation to Communist China.

On March 24, 1954, Commissioner Mackey testified before the Senate Appropriations Sub-Committee as follows (p. 158, Part I, Hearings on H.R. 8067, 83rd Congress, 2nd Session):

> ". . . I should like to say right here Senator, if I may, that we have come to a solution of this problem and we are now being issued documents for the deportation of Chinese.
>
> Senator Dirksen. What is their destination?
>
> Mr. Mackey. Their destination is the interior of China by way of Hong Kong."

In the 1953 Annual Report of the Immigration and Naturalization Service at page 43 it is observed:

> "This Service has an accumulation of approximately 600 Chinese under orders of deportation because of inability to procure travel documents for deportation to China. The British Consul in New York recently advised the Service that transit visas will be granted through Hong Kong.
>
> In the first planned group of 55 deportable Chinese aliens, each has requested a stay of deportation pursuant to this Section predicated upon claims that he would be 'physically persecuted' if deported to the Chinese mainland. Therefore, it can be anticipated that practically all of the Chinese will claim 'physical persecution' when arrangements for their deportation are completed."

And, in practically every case, claims of physical persecution were denied. Considerations of long resi-

dence, American Army service, anti-communism of the alien were not considered important. The test was whether the individual was officially connected with the Nationalist Government, thus excluding practically all of the 600 under orders of deportation.

The New York Times of February 27, 1954, in an editorial entitled "Deportation Outrage," described the situation as follows:

> "These men, seamen who have overstayed leave, illegal entrants, and in one case a person involved in a felony, are admittedly deportable. That, however, is not the issue, nor ought not to be the issue, when a deportation order is tantamount to a sentence to torture and probably death.
>
> A spokesman for the Immigration Service in Washington is reported to have stated that the Service had concluded that 'claims of possible persecution' for these men were without basis. This is the height of naivete, and to say fantasy. Since when were claims of 'possible' persecution of proclaimed anti-Communists by Communists 'without basis'?
>
> * * * *
>
> We gave some good American lives to defend the righteous principle that declared anti-Communists should not be delivered into the hands of the enemy. We can afford to give some thought and effort so that others are not so delivered through either stupidity or the blind worship of a few yards of red tape."

On February 28, 1955, in a *Report on the Administration of the Immigration and the Nationality Act,* the House Judiciary Committee criticized the manner

in which stays of deportation were handled as follows (p. 69):

> "It is believed that cold statistical figures could not convey the complexity of the problem involved in 'withholding of deportation' under section 243 (h) of the Act. . . .
>
> There seems to be no set policy covering the exercise of discretionary power vested by the law in the Attorney General yet delegated by him to lower grade officers of the Immigration and Naturalization Service, who do not appear to be properly educated and trained to judge the difficult and involved elements entering into the cases before them under this section.
>
> Many officials of the Service simply do not possess the necessary intellectual background which would permit them to evaluate the imponderable factors related to the alien's social and political past, his activities, his family ties, and his other connections which may be the direct or indirect cause of persecution in the countries placed in the Soviet orbit.
>
> Similarly, few officers of the Service now vested with discretionary powers to make decisions under section 243(h) are possessed of sufficient knowledge of the past, recent, and current history of the many countries of Europe and Asia where physical persecution for political reasons is a matter of everyday practice. Not many of them know how Soviet terrorism operates behind the Iron Curtain and whom and why it singles out for destruction. In many cases brought to the attention of the task force by sources preferring to remain anonymous, apparently well justified

claims of fear of persecution in at least three countries now dominated by international communism have been flatly rejected without the presentation of anything even remotely resembling a factual rebuttal of the claims made by the deportee."

C. Deportation to Communist China—Present.

On October 31, 1956, in response to repeated criticism, the Immigration and Naturalization Service announced a new policy, restricted to expulsion and deportation cases. In *Matter of Lee Sung*, A-7921505, it was officially decreed:

"Official notice may be taken that the China mainland is under the control of a de facto Communist government. As in other Communist states, this government operates as a totalitarian dictatorship, suppressing personal liberties and imposing arbitrary restraints on the people when necessary to maintain its authority or secure its objectives. Its methods for imposing its will include persecution of individuals and groups by way of economic sanctions, corporal punishment, incarceration, and execution.

While it can be accepted as a general proposition that the Peiping government at times engages in these forms of persecution to further its authoritarian ends, no reliable information has yet been made available to this Service to indicate whether such persecution is directed indiscriminately against the populace as a whole or whether it is employed on a selective basis against particular elements. It is not known to what extent or to what degree such factors as personal political beliefs or religious views, in themselves, are

noticed or acted upon by the Communist authorities. Another unknown factor is whether prior presence in the United States has any bearing on the kind of treatment accorded by the Communist authorities to a Chinese national upon his return to the mainland, despite the fact that there is evidence indicating strong and continued efforts on the part of these same authorities to persuade their overseas nationals to reestablish themselves and their residence within Communist China. These and other specific considerations bearing on the question of physical persecution as practiced on the China mainland today are matters which await further inquiry and to which an answer may be provided through the collation of intelligence material being gathered by other agencies of the United States government.

* * * *

Pending receipt of official information which may assist in resolving the issues presented in this case, the applicant and other Chinese nationals in similar circumstances will be granted a stay of deportation until July 1, 1957. It is believed that by that time the cooperating agencies of the United States government will have succeeded in obtaining the desired information; and this case, along with the others, will then receive further consideration."

Today, therefore, temporary stays are being granted to those aliens ordered deported following expulsion proceedings and not to those aliens ordered deported following exclusion proceedings, even though they may have been paroled into the United States for a number of years.

II.

THE COMPLAINT STATES A CAUSE OF ACTION TO REVIEW NON-EXERCISE OF DISCRETION TO CONTINUE PETITIONER'S PAROLE.

(A) Parole of Excluded Aliens Under 1917 Act.

Ever since *Kaplan v. Tod*, 267 U.S. 229 (1925), excluded aliens have been paroled under our immigration laws. The 1917 Act practice is reflected in *Chong v. McGrath*, where immediate deportation was not deemed practical. This practice is set forth in the *Immigration Manual* of the Immigration and Naturalization Service, published in 1946, which contains the following at pages 5169-5170:

> "An alien who arrives at a port of entry, applies for admission, and is excluded may, when the dictates of humanity demand such action, be paroled into the United States.
>
> * * * *
>
> The parole of an inadmissible alien, under proper conditions or safeguards, may be authorized by the port authorities——
>
> (A) For an alien wife of a United States citizen, resident of the United States, who has accompanied her husband abroad and innocently failed to obtain an immigration visa or to conform to the requirement of law.
>
> (B) For registry . . . (A method of legalizing the status of an alien.)
>
> (C) For criminal prosecution in the United States. . .
>
> (D) For emergency medical or surgical treatment.

(E) *In such other exceptional cases in which to do otherwise would be inhuman or hold the Service up to ridicule.*" (Italics supplied.)

(B) Parole of Excluded Aliens Under the 1952 Act.

When the 1952 Immigration Act was originally drafted (S. 3455, 81st Congress, 1st Session, and S. 716, 82nd Congress, 1st Session, Section 212(d)(5)), it restricted paroles into the United States "solely for the purpose of receiving medical treatment." The Immigration Service protested this limitation stating in unpublished comments on section 237 of S. 716, 82nd Congress, 1st Session (on file in the Supreme Court Library):

> "The Service has on occasions encountered cases in which immediate deportation of excluded aliens is not practicable. In such cases unless the power to parole is exercised by the Attorney General, it would be necessary to keep the alien in detention for extended periods. We have in mind, for example, the cases of some 100 aliens who arrived on their own vessels. The aliens were inadmissible under the law and were therefore ordered excluded and deported. The vessels either became unseaworthy and sank, or were confiscated to satisfy legal penalties. If the bill is to be read literally, it would appear that such persons would have to be kept in detention at the ports of arrival indefinitely, until one way or another, they could raise the money to purchase return passage. Even then under the particular circumstances, the aliens would have difficulty in locating a country which would be willing to receive them. *Being refugees from a communist invasion of their own country,*

they could not return there. The Service recommends that the Attorney General be given some right to parole such aliens into the United States until deportation could be effectuated. This would be of advantage not only to the alien, but to the Government, since the latter would be relieved of the expenses for the support and maintenance of the aliens." (Italics supplied.)

Thereafter section 212(d)(5) (8 U.S.C. 1282(d)(5)) was amended to authorize parole of excluded aliens into the United States "for emergent reasons or for reasons deemed strictly in the public interest." *House Report 1365*, 82nd Congress, 2nd Session, p. 52, describes the change as follows:

> "Discretionary authority is vested in the Attorney General in paragraph 5 of section 212(d) to parole into the United States temporarily otherwise inadmissible aliens for emergent reasons or for reasons deemed strictly in the public interest. . . . The provision in the instant bill represents an acceptance of the recommendation of the Attorney General with reference to this form of discretionary relief."

(C) Petitioner's Parole May Be Continued Under the 1917 or 1952 Act.

The foregoing clearly demonstrates that the Attorney General has discretionary authority under the 1917 Act and under the 1952 Act to continue the parole of appellants to prevent their return to Communist China. From 1949 until 1953, as we have noted in Point I, the Immigration Service freely exercised this discretion to prevent deportation of excluded aliens to

Communist China. Since 1953, however, there has been a refusal to exercise discretion in the case of excluded Chinese aliens. The comments on S. 716, supra, clearly show that under the 1917 Act and under the 1952 Act such discretionary authority exists.

We submit that under this allegation of the complaint, petitioner was entitled to invoke the discretion of the Attorney General and have such discretion exercised. This non-exercise of discretion is particularly inexplicable in the light of the recent parole of Hungarian refugees. Determinations were made to bring these aliens from abroad, exclude and parole them into the United States. The petitioner is entitled to a similar exercise of discretion to escape communist terrorism.

III.

PETITIONER IS ENTITLED TO THE EXERCISE OF DISCRETION UNDER 243(h) (8 U.S.C. 1253(h)) OF THE 1952 ACT.

It is asserted, with reasonable justification, that petitioner would suffer physical persecution and probable loss of life as a result of the administrative decision of the Immigration and Naturalization Service. There can be no room for doubt that petitioner would be a likely object of the Communist Regime. The order of exclusion and deportation following petitioner's arrival does not bar her from the relief requested. Any contention that exclusion does not lead to deportation is as erroneous as it is unrealistic.

Section 237 of the Immigration and Nationality Act (8 U.S.C. 1227) like its predecessor (Section 18 of the 1917 Act, 8 U.S.C. 154) is applicable where there is to be an immediate deportation of an excluded alien. That section specifically is limited by its own language to those aliens "excluded under this Act." Hence, its provisions would not apply in the case of this petitioner.

Section 243(a) (66 Stat. 212, 8 U.S.C.A. 1253(a)), specifically provides for the deportation of any alien whether his removal be under the provisions of that Act "*or any other Act.*" (Emphasis added.)

If Section 20 of the Immigration Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950 (8 U.S.C.A. 156) is not the law under which deportation of the petitioner is sought, then Section 243 is the only section under which she may be deported.[4]

In *Quan v. Brownell*, ... F.2d ..... (decided June 27, 1957), the Court of Appeals for the District of Columbia said:

> "The Attorney General argues that there is a difference between excluding an alien and deporting him and that these aliens are to be excluded. But the very sentence of the statute which provides for excluding aliens uses the word 'deported'. The concluding clause in that sentence is 'shall be allowed to enter or shall be excluded and

[4]Compare Section 405(a) of the Immigration and Nationality Act of 1952, the so-called "savings clause" of that Act, 8 U.S.C.A. 1101, Note; *U. S. v. Menasche*, 348 U.S. 528 (1954); *Wong Kay Suey v. Brownell*, 227 F.2d 41 (1955), cert. den. 350 U.S. 969.

deported'. And the sentence which provides for the return of excluded aliens on the vessel bringing them uses the words 'deported' and 'deportation.' The basic sentence is: 'Any alien * * * who is excluded * * * shall be immediately deported * * *.' And the proviso in that sentence is 'unless the Attorney General, in an individual case, in his discretion, concludes that the immediate deportation is not practicable or proper.' The regulations reflect the same idea. For example, Section 237.1, Title 8, Code of Federal Regulations (1952) speaks of 'The immediate deportation of an excluded alien'. The distinction relevant to Section 243 is between aliens who are, legally speaking, in the United States, by entry or parole, and those who, legally speaking, are not within the borders.

That the predecessor section to Section 243(h) of the 1952 Act, which was Section 23 of the 1950 Act, applied to an alien who was excluded was settled by Ng Lin Chong v. McGrath. Section 243 (a) of the 1952 Act applies to aliens 'in the United States'. We think that section gives the Attorney General discretion in respect to the country to which he will order aliens deported, whether they are legally in the United States by entry or by parole."[5]

The Court below, relying upon its earlier decision in *Joe Sing v. Barber*, 215 F.2d 906 (C.A. 9, 1954), cert. granted 348 U.S. 910, judgment vacated as moot 350 U.S. 398, which cited *Kaplan v. Tod*, 267 U.S. 229

[5] *Ng Lin Chong v. McGrath*, 202 F.2d 316 (C.A., D.C. 1952).

(1925), held that Section 243(h) requires that an alien be "within the United States" and that an excluded alien on parole is not within the United States. We submit that these decisions are straight-jacketed by a legal fiction and fail to analyze the Immigration and Nationality Act or the *Kaplan* case properly.

Mr. Justice Holmes regarded an alien detained at or paroled from Ellis Island "as stopped at the boundary line" in interpreting residence under our naturalization statute in *Kaplan v. Tod*, 267 U.S. 229. Arrival at or parole from Ellis Island is not lawful admission to the United States, a prerequisite for naturalization. Mr. Justice Holmes was the last person in the world, however, to believe that the "boundary line" concept should be turned into dogma and "cease to provoke further analysis." (Holmes, J., dissenting, in *Hyde v. United States*, 225 U.S. 347, 384, 391 (1911) Frankfurter, J., concurring, in *Dennis v. United States*, 341 U.S. 543 (1950).) Note should be made, moreover, that in *Chin Yow v. United States*, 208 U.S. 8 (1908), Mr. Justice Holmes refused to apply the fiction of the boundary line doctrine to a subsequent case. The *Kaplan* case involved naturalization and residence for naturalization purposes which are not here involved. Peculiarly, Jew Sing was considered outside of the United States under Section 243(h) but within the United States for the purpose of naturalization.

True, section 243(h) authorizes a stay of deportation for aliens within the United States, but it should be noted that the 1952 Act itself gives evidence that

a paroled alien is to be regarded as within the United States.

Section 212(d)(5) (8 U.S.C. 1182(d)(5)) provides that excluded aliens may be paroled "into the United States temporarily." An alien paroled "into the United States" is certainly "within the United States." Section 237(a) (8 U.S.C. 1227) speaks of aliens "arriving in the United States." Section 237(b) requires carriers to remove inadmissible aliens "from the United States", and Section 235(a) (8 U.S.C. 1225) requires aliens "coming into the United States" to state the purpose of their visit under oath. Aliens "in the United States" are required to register. (Section 262, 8 U.S.C. 1302.) Aliens "within the United States" who are required to register must give notice of address changes. (Section 265, 8 U.S.C. 1305.) We have been advised officially that the Immigration Service considers paroled excluded aliens within the United States and subject to sections 262 and 265. An alien who has been excluded and deported and who is thereafter "found in the United States" without obtaining advance consent to reenter, if required, is guilty of a crime. (Section 276, 8 U.S.C. 1326.) Aliens "within the United States," except excluded aliens, may bring a declaratory judgment action under section 360(a). (8 U.S.C. 1503a.)

It is clear from the foregoing that an excluded alien is deemed to be within the United States under many of the provisions of the 1952 Act. In the absence of an express restriction, which is lacking here, the same words in different parts of a statute are assumed to

have been used in the same sense throughout the statute. *Pampanga Sugar Mills v. Trinidad*, 279 U.S. 211, 218 (1928). If excluded aliens on parole are within the United States for registration purposes, and for purposes of declaratory judgment actions as the language of section 360 indicates, then they are within the United States under section 243(h).

It was stated by this Court in *Savorgnan v. United States*, 338 U.S. 491, 505:

> "* * * the actual 'place of general abode' is the sole test for determining residence."

This principle is set forth in Section 101(a)(33) of the Immigration and Nationality Act, which provides:

> "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." (66 Stat. 166; 8 U.S.C. 1101(a)(33).)

The Fifth Amendment provides without qualification that no person shall "be deprived of life, liberty, or property, without due process of law." It is not confined solely to the protection of citizens but as this Court has stated: "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369. This protection extends to all whose presence brings them within reach of the judicial and administrative processes of our governmental bodies. *U. S. v. Pink*, 315 U.S. 203, 228. Accordingly, it is submitted that the decisions of the Court below and the Immigration and Naturalization Service, holding

that an alien physically residing in the United States and subject to the jurisdiction thereof, is not within the United States are based upon an erroneous interpretation of the law.

THE PETITION FOR WRIT OF HABEAS CORPUS STATES A CAUSE OF ACTION.

Petitioner's application for a writ of habeas corpus was denied by the District Court without issuance of the writ, or an order to show cause, or a hearing on the merits. (R. 8.) The verified application was the only pleading filed in this cause.

It is well realized that an "application is not 'entertained' by a mere filing"; and that such an application "must meet the statutory test of alleging facts that entitled him to relief." *Brown v. Allen*, 344 U.S. 443, 461; rehearing denied 345 U.S. 946 (1953).

Section 2243 of Title 28, U.S.C. provides in part as follows:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto."

Petitioner's application set forth serious charges, alleging that the respondent failed to consider petitioner's request for a stay of deportation, a right prescribed by Congressional enactment. It further

asserted that petitioner's deportation to Communist China (which was imminent) was tantamount to a sentence of probable death; and that such decision was an abuse of discretion and contrary to law. (R. 6.) "Since the petition for habeas corpus was denied without requiring the respondent to answer and without a hearing, we must assume that the petitioner's allegations are true." *House v. Mayo*, 324 U.S. 42, 45, rehearing denied 324 U.S. 886 (1945).

This Court has held that "The writ of habeas corpus commands general recognition as the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional rights." *Darr v. Burford*, 329 U.S. 200, 203 (1950). Also compare *Hawk v. Olson*, 326 U.S. 271, 274 (1945).

This Court, in a number of decisions over a long period of time, has consistently held that habeas corpus is available in a proper case as a remedy against unlawful deportation from the United States.

United States v. Sing Tuck, 194 U.S. 161;
Bilokumsky v. Tod, 263 U.S. 149;
Heikkila v. Barber, 345 U.S. 229.

The immigration administrative decision is subject to judicial review where the proceedings have not conformed to the traditional standards of fairness required by the due process of law clause of the Fifth Amendment to the Constitution of the United States. *Japanese Immigrant Case*, 189 U.S. 86; *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103; *Wong Yang Sung v. McGrath*, 339 U.S. 33; *Kwong Hai*

Chew v. Colding, 344 U.S. 590. Or where there has been arbitrariness or abuse of discretion by the administrative agency. *Low Wah Suey v. Backus*, 225 U.S. 460; *Kwock Jan Fat v. White*, 253 U.S. 464; *Carlson v. Landon*, 342 U.S. 524; *Yaris v. Esperdy*, 202 F.2d 109, 112. The same general rule applies to determine whether or not the law has been correctly applied. *Gegiow v. Uhl*, 239 U.S. 3; *Kessler v. Strecker*, 307 U.S. 22; *Bridges v. Wixon*, 326 U.S. 135; *Fong Haw Tan v. Phelan*, 333 U.S. 6; Cf. *McGrath v. Kristensen*, 340 U.S. 162.

The questions raised in the instant proceeding are clearly the subject of inquiry by habeas corpus. Deportation cannot be effected by administrative fiat except when it complies with Congressional legislation. The only pleading in this matter alleges that the petitioner was denied a vital right guaranteed by the Constitution and laws of our nation.

The District Court concluded "that the petition for writ of habeas corpus filed herein does not state facts sufficient to warrant the writ." (R. 8.) The Court of Appeals for the District of Columbia, when considering an action filed under the Declaratory Judgment Act, seeking review of similar deportation orders, in part held:

> "* * * here deportability is conceded and the only attack is upon the Attorney General's decision that appellants should be deported to Continental China. * * *"
>
> "* * * the question is whether the complaint stated a case for preliminary injunction. It alleges

in substance that appellee, acting through his agents, arbitrarily and contrary to law has determined that claims of persecution made by Chinese aliens and filed pursuant to Section 243(h) of the Immigration and Nationality Act shall not be honored, and that in so determining he has refused to exercise his statutory discretion, which if exercised might result in the appellants being permitted to remain in the United States. These allegations, taken as true in the absence of denial of responsive pleading, obviously state a case for injunctive relief against imminent deportation to Continental China." *Lim Fong v. Brownell,* 215 F.2d 683, 684 (1954).

In *U. S. v. Shaughnessy,* 205 F.2d 238, 240 (2 Cir., 1953) the Court held that the factual question—entrant alien or assimilated resident alien could only be determined after a hearing on that issue. In *Price v. Johnston,* 334 U.S. 266, 291 (1948), this Court stated:

> "Appellate Courts cannot make factual determinations which may be decisive of vital rights where crucial facts have not been developed."

To the same effect, as to requirements of a hearing on disputed facts, are *Walker v. Johnston,* 312 U.S. 275, 285, 287 (1941); *Holiday v. Johnson,* 313 U.S. 342, 350 (1941); *Waley v. Johnston,* 315 U.S. 101 (1942); *Cochrane v. Kansas,* 315 U.S. 255, 258 (1942). This doctrine applies even though the Court might consider the allegations improbable or incapable of proof. *Holiday v. Johnston,* supra; *Waley v. Johnston,* supra. Such an application should only be denied when it is doomed to futility from its inception.

Mezei, 345 U.S. 206. That Section 243(h) of the 1952 Act is applicable only to expulsion of an alien in legal contemplation "within the United States" appears, not only from its language, but from its context in the statute. It occurs in Chapter 5 dealing with expulsion; Chapters 2 and 4 deal with exclusion. Further, the legislative history of the section shows that it was intended to apply only to expulsion. Its consideration was prompted by concern for the national security in view of the large number of outstanding unexecuted expulsion orders against undesirable aliens at large in this country. Congress, by the Internal Security Act of 1950, amended Section 20 of the Immigration Act of 1917 to facilitate the removal of these aliens, but, recognizing as a matter of grace a responsibility toward aliens once within this country's protection, added to this section the privilege now afforded by Subsection (h) of Section 243.[2] Section 18 of the Act of 1917, providing that *excluded* aliens be immediately sent back to the country whence they came, remained unaffected by the Internal Security Act:

There are strong reasons why Congress did not intend Section 243(h) to be applicable to one in petitioner's status. It is one thing to recognize a responsibility to aliens who have had residence in the United States for many years, some of whom may have lost all contact with their country of origin; it is quite another to assume a similar responsibility toward aliens who have not been within the protection of the United States and merely seek to enter from a

---

[2] See H.R. 1192, 81st Cong., 1st Sess., pp. 8, 9, 17, 18; S. Rep. 2239, 81st Cong., 2d Sess., pp. 4, 10; S. Rep. 2369, 81st Cong., 2d Sess., pp. 14, 15; 96 Cong. Rec. 11724, 14170, 15632, 15726; U.S. Code Cong. Serv., 1950, 81st Cong., 2d Sess., pp. 3911-3912.

Petitioner's forced departure from the United States to a country dominated by a totalitarian form of government is diametrically opposed to the announced policy of this government. The decision of the Court below, in effect, determines that the extraordinary powers granted to this administrative agency are not subject to judicial review. Any delegated executive power is subject to conformance with the due process clause of the Fifth Amendment. *Ex parte Endo,* 323 U.S. 283, 299. Exercise of administrative discretion must be consistent "with fundamental principles of justice embraced within the conception of the due process of law" clause. *Tang Tung v. Edsell,* 223 U.S. 673, 682 (1912); *Joint Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 143, 161, 175, 176, 178, 187 (1951); *Carlson v. Landon,* 342 U.S. 524, 538 (1952). Aliens who have passed through our gates, even illegally, may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law. *Japanese Immigrant Case (Yamataya v. Fisher),* 189 U.S. 86, 100, 101 (1903); *Wong Yang Sung v. McGrath,* 339 U.S. 33, 49, 50 (1950). The application for writ of habeas corpus clearly stated a claim for relief. We submit that petitioner, if given an opportunity, can reasonably establish that she will suffer physical persecution if deported to Communist China.

foreign country. If the claim of persecution in the country from which he came would entitle an alien to the benefit of Section 243(h), even though otherwise inadmissible, the result could well be, as a practical matter, a flood of physical entries by persons having the most tenuous claim to admission to this country. Under petitioner's view, presumably the mere presentation of an alien at the border would be sufficient for him to invoke the section. Nor can it be said to be material that the Attorney General, on petitioner's request, admitted petitioner into the United States on parole during the pendency of—and solely for the purpose of—the exclusion hearings.[3]

It is true, however, that the very issue here presented was the one involved in *Jew Sing* v. *Barber*, 215 F.2d 906 (C.A. 9), in which certiorari was granted by this Court (348 U.S. 910), but judgment was vacated for mootness on November 21, 1955 (350 U.S. 898). In that case, the claimant, although technically an excluded alien, had resided continuously in this country for some twenty-six years, and had served in this country's armed forces prior to the time he made a visit to China and attempted re-entry as a native-born American citizen. His parole had been for the pur-

[3] Petitioner's status is clearly distinguishable from that of the alien in *Ng Lin Chong* v. *McGrath*, 202 F.2d 316, in which the Court of Appeals for the District of Columbia Circuit held that, where the Attorney General chose to delay the deportation of an alien subject to immediate rejection for the purpose of prosecuting him, the alien could not be sent back under Section 18 of the 1917 Act, but must be deported under the expulsion procedures of Section 20, with the consequent right to take advantage of the physical-persecution provision. Here, petitioner's detention and parole were solely for her own interests in attempting to prove her right to enter, and her parole was terminated as soon as the exclusion proceedings were concluded.

CONCLUSIONS.

It was the purpose and intent of Section 243(h) of the Immigration and Nationality Act to prevent, for humanitarian reasons, deportation of worthy aliens who would suffer physical persecution. The Immigration and Naturalization Service refused to consider petitioner's application filed pursuant to that part. This was a denial of a vital right guaranteed by the Constitution and laws of our nation.

Acceptance of the decisions below would "inject into our system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute." *Stack v. Boyle,* 342 U.S. 1. Likewise, acceptance of the mandate of the administrative agency would condemn the petitioner herein to probable death or submission to principles to which she can not adhere. It is contradictory to our system of government to force a person so situated to accept a minor official's ultimatum without any opportunity to be heard.

For the reasons set forth above, we submit that the judgment below should be reversed.

Dated, San Francisco, California,
October 18, 1957.

Respectfully submitted,

JOSEPH S. HERTOGS,
Attorney for Petitioner.

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No. 105

In the Supreme Court of the United States

OCTOBER TERM, 1956

LENG MAY MA, *Petitioner*

v.

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO DISTRICT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MEMORANDUM FOR THE UNITED STATES

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No. 105

In the Supreme Court of the United States.

OCTOBER TERM, 1957

LENG MAY MA, PETITIONER

v.

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 916

LENG MAY MA, *Petitioner*

v.

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO DISTRICT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. i; R. 15) is reported at 241 F. 2d 85.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1957 (Pet. App. iv; R. 17). The petition for a writ of certiorari was filed on April 17, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, an excluded alien who has failed to establish her claim of a right to enter the United States, and who was admitted into the country on parole only during the pendency of the exclusion proceedings, is entitled to have an application for a stay of deportation entertained under Section 243(h) of the Immigration and Nationality Act on the ground that, if deported, she would be subject to physical persecution.

STATUTE INVOLVED

Section 243(h) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 214, 8 U.S.C. 1253 (h), provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

Section 237(a) of the same Act provides in relevant part:

> (a) Any alien (other than an alien crewman) arriving in the United States who is excluded under this Act, shall be immediately deported to the country whence he came, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper. * * *

Section 212(d) of the same Act provides in relevant part:

* * * * * * * * *

(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

* * * * * * * * *

Section 18 of the Immigration Act of 1917, 39 Stat. 887, as amended, 8 U.S.C. 154 (1946 ed.), provides in relevant part:

All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper. * * *

STATEMENT

Petitioner is a native of China who claimed to have acquired United States citizenship at birth on the statutory ground that her father was a United States citizen. Upon her arrival in this country on May 4, 1951, and subsequent thereto, she was accorded hearings by the Immigration and Naturalization Service, which found that she had failed to establish her identity as a United States national.

She was ordered excluded by a Board of Special

Inquiry on November 19, 1952 and the Board of Immigration Appeals affirmed the order on December 3, 1953. On January 5, 1954, she was notified to surrender herself for deportation to China.[1] She then applied for a stay of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1253(h)) alleging that deportation would subject her to physical persecution and probable death. She was advised by the Immigration and Naturalization Service that, since she was excluded from admission to the United States, she was not eligible for the relief afforded by Section 243(h).

Thereafter, she filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. In the petition, she contended that the Service's ruling was a denial of due process and an abuse of discretion, and that her contemplated deportation was contrary to law and constituted unusual and inhumane punishment (R. 3-6).

The petition for habeas corpus was denied by the District Court on the ground that it did not state facts sufficient to warrant the writ (R. 8). On appeal, the judgment was unanimously affirmed by the Court of Appeals for the Ninth Circuit (R. 17).

ARGUMENT

Section 243(h) of the Immigration and Nationality Act of 1952, under which petitioner made her application, provides that the Attorney General "is authorized to withhold deportation of any alien within the

[1] The files of the Immigration and Naturalization Service show that petitioner had been released under bond on August 11, 1952.

United States'" to any country in which he believes the alien would be subject to physical persecution. As the court below held, petitioner is not in a legal sense "within the United States" to come within that statute.

While she was detained in custody for approximately fifteen months and enlarged under parole for some seventeen months, this was merely to give her an opportunity to prove her eligibility to enter. Almost immediately after the final administrative decision as to her ineligibility to enter in December 1953, she was ordered to surrender to the Immigration Service. She is an alien who has been *excluded*, legally in the position of one who has come to the border and not been allowed to come in. This is her status by virtue of Section 212(d) of the 1952 Act (*supra*, pp. 2-3), and even without statutory authority her status under prior laws. *Kaplan* v. *Tod*, 267 U.S. 228.

As an excluded alien, petitioner must, under the statute, be sent back to the country whence she came. This is true either under Section 237(a) of the 1952 Act, in effect when petitioner was finally excluded (*supra*, p. 2), or under Section 18 of the Immigration Act of 1917, in effect when petitioner first made application for admission (*supra*, p. 3). Petitioner's argument (Pet. 7-8) that she is not subject to the provisions of Section 237 of the 1952 Act because not excluded under the 1952 Act thus does not aid her position. She is still an excluded alien who has never in a legal sense come "within the United States."

Expulsion and *exclusion* are two concepts having clearly defined practical, historical, and legal distinctions. *Kwong Hai Chew* v. *Colding*, 344 U.S. 590; *Knauff* v. *Shaughnessy*, 338 U.S. 537; *Shaughnessy* v.

pose of enabling him to apply for naturalization, which he ultimately obtained. The Court of Appeals for the Ninth Circuit held, as in this case, that Section 243(h) was inapplicable. Since that decision, there have been decisions to the same effect in the Southern District of New York, the district of the other most important port of entry. *United States ex rel. Lue Chow Yee* v. *Shaughnessy*, 146 F. Supp. 3; *Dong Wing Ott* v. *Shaughnessy*, 142 F. Supp. 379.

CONCLUSION

For the reasons stated above, we believe that the decision below is correct. However, in view of the prior grant of certiorari in the *Jew Sing* case in which, despite certain factual differences, the technical legal issue was the same, we do not oppose certiorari if the Court should conclude that the issue still warrants definitive resolution.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
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MAY 1957.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 105

LENG MAY MA, PETITIONER

v.

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (R. 13–15) is reported at 241 F. 2d 85.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1957 (R. 15). The petition for a writ of certiorari was filed on April 17, 1957, and was granted on June 3, 1957 (R. 16). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner, an excluded alien who has failed to establish her claim of a right to enter the United States, and who was admitted into the country on parole only during the pendency of the exclusion proceedings, is entitled to have an application for a stay of deportation entertained under Section 243 (h) of the Immigration and Nationality Act of 1952 on the ground that, if deported, she would be subject to physical persecution.

STATUTES INVOLVED

Section 243 (h) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 214, 8 U. S. C. 1253 (h), provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

Section 237 (a) of the same Act provides in relevant part:

> (a) Any alien (other than an alien crewman) arriving in the United States who is excluded under this Act, shall be immediately deported to the country whence he came, in accomodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper. * * *

Section 212 (d) of the same Act provides in relevant part:

* * * * *

> (5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

* * * * *

Section 18 of the Immigration Act of 1917, 39 Stat. 887, as amended, 8 U. S. C. (1946 ed.) 154, provides in relevant part:

> All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper. * * *

STATEMENT

Petitioner is a native of China who claimed to have acquired United States citizenship at birth on the

basis that her father was a United States citizen. Upon her arrival in this country on May 4, 1951, and subsequent thereto, she was accorded hearings on her claim by the Immigration and Naturalization Service. She was released under bond on August 11, 1952.

On November 19, 1952, a Board of Special Inquiry found that she had failed to establish her identity as a United States national and ordered her excluded. Her appeal to the Board of Immigration Appeals was dismissed on December 11, 1953. On January 5, 1954, she was notified to surrender herself for deportation to China. She then applied for a stay of deportation under the provisions of Section 243 (h) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1253 (h)), alleging that deportation would subject her to physical persecution and probable death. She was advised by the Immigration and Naturalization Service that, since she was excluded from admission to the United States, she was not eligible for the relief afforded by Section 243 (h).

She thereupon filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California claiming that denial of relief under Section 243 (h) was a violation of due process and an abuse of discretion, and that her contemplated deportation was contrary to law and constituted unusual and inhumane punishment (R. 3–6).

The petition for habeas corpus was denied by the District Court on the ground that it did not state

facts sufficient to warrant the writ (R. 8). On appeal, the judgment was affirmed (R. 15), the Court of Appeals holding that petitioner was not an alien "within the United States" who might seek a stay of deportation under Section 243 (h).

In her brief to this Court, following the grant of certiorari, petitioner raised, for the first time, the question of the power of the Attorney General to continue her parole in this country under Section 212 (d) (5) of the 1952 Act (Pet. Br. 21-23). The Government was of the opinion that, although this question was not one properly before the Court in this case, Section 212 (d) (5) was in fact broad enough to permit the Attorney General to entertain a request by an excluded alien like respondent for further parole and to grant relief to such an alien, provided that the Attorney General concluded that the continuation of parole was justified by "emergent reasons or * * * reasons deemed strictly in the public interest" (*supra*, p. 3). After consultation with petitioner's counsel, the Solicitor General, in a motion filed with the Court, suggested that the briefing of this case be held in abeyance so that petitioner might request relief under Section 212 (d) (5) and that the case might remain *in statu quo* pending completion of the administrative proceeding in contemplation.[1] The Court granted the motion on January 13, 1958. Thereafter, on January 17, 1958, petitioner requested continuation of parole. On February 13, 1958, the District Director, Immi-

[1] The motion pointed out that grant of relief under Section 212 (d) (5) would cause the case to become moot.

gration and Naturalization Service, San Francisco, stating that he had considered all aspects of the case, including the allegation of physical persecution, denied the request.[2]

SUMMARY OF ARGUMENT

I

Petitioner, who does not question the validity of the finding that she is ineligible to enter this country, is an excluded alien. As such, she is subject to removal to the country whence she came, under both Section 18 of the Immigration Act of 1917 and Section 237 (a) of the Immigration and Nationality Act of 1952. The statute, as well as judicial precedents, establishes that neither her removal from the ship nor her enlargement on parole while she sought to prove her eligibility to enter this country makes her anything other than an excluded alien. As an excluded alien, she is not an alien "within the United States" entitled to have an application for a stay of deportation entertained under Section 243 (h) of the Act of 1952. The issue here is one of statutory construction. Congress did not intend, we submit, that this section be applicable to an alien seeking admission to the United States who has been denied permission to enter.

A. The context of Section 243 (h) in the 1952 statute shows that it applies only to aliens ordered expelled, not to aliens ordered excluded. Although the

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[2] This determination was made on the basis of the existing record on file with the Immigration and Naturalization Service, together with the additional papers filed by the alien in support of her request for continuation of parole.

word "deportation" is used generally to denote any physical transportation of an alien out of the country, there is a clear and settled legal distinction between removal of an alien who has never been allowed to enter, and removal, after arrest and apprehension, of an alien found within the United States. The language, structure and organization of the 1952 Act fully preserve this distinction. The Act sets up separate grounds for exclusion, which are distinct from those for expulsion; it establishes separate administrative procedures for determining these grounds, separate provisions for transportation out of the country where such grounds are found to exist, and separate provisions for a stay or suspension of such transportation. Provisions relating to exclusion appear in Chapters 2 and 4. Chapter 5 deals exclusively with expulsion. Section 243 (h) appears in Chapter 5.

B. The legislative history of Section 243 (h) shows that it applies only to expulsion of resident aliens. The provision had its genesis in security measures—bills introduced in the 81st Congress to facilitate the removal of a large number of aliens in this country who had been ordered deported but who were still at large. Because there was some concern that enforcement of the suggested deportation controls might, in certain cases, make the deportation of an alien resident a death sentence, the proviso that no alien should be deported to a country where, in the opinion of the Attorney General, he would suffer physical persecution was appended to the legislation. The proviso became law by virtue of the Internal Security Act

of 1950, which amended Section 20 of the 1917 Act, the Section containing the expulsion provisions of the prior immigration law. Section 18 of the 1917 Act, providing for immediate removal of aliens ordered *excluded*, remained unaffected by the Internal Security Act.

In the 1952 Act, Congress changed the wording of the proviso, describing the alien entitled to relief thereunder as one "within the United States." It is thus clear that the proviso, even when read apart from its context, applies only to aliens found in the United States and ordered deported after apprehension.

C. The fact that an excluded alien has been detained in custody or enlarged on parole while seeking to establish a right to enter this country does not bring such an alien "within the United States" in the meaning of Section 243 (h). The 1952 Act expressly provides that parole shall *not* be regarded as an admission of an alien, and that after the purposes of the parole have been served the alien must be returned to custody and dealt with as any other applicant for admission. Section 212 (d) (5). Years before this explicit legislation, this Court settled that mere physical presence here, at the boundary or on parole, does not bring an excludee legally within the country. *Kaplan* v. *Tod*, 267 U. S. 228.

II

The purposes of petitioner's enlargement on parole having been served, Section 212 (d) (5) of the 1952 Act requires that she be subjected to immediate deportation under Section 237 (a) of the Act. Her

brief to this Court raised, for the first time, the question of the discretionary power of the Attorney General to continue her parole. The Immigration and Naturalization Service (as the delegate of the Attorney General) has since considered a request for continuation of parole, submitted during the pendency of the case in this Court. The Service has not deemed further parole justified by "emergent reasons" or reasons "strictly in the public interest" (Section 212 (d) (5)). Any possible issue as to the reviewability of this denial of continuation of parole (which we believe to be a political and discretionary determination not subject to review at all) is outside the present case. The sole issue before this Court is the issue raised and decided below—whether the Attorney General was obliged to entertain the application of petitioner, an excluded alien, under Section 243 (h).

ARGUMENT

Petitioner does not challenge the validity of the order excluding her, nor the proceedings culminating in that order. Her status as an alien applying for admission who has been found ineligible to enter must thus be taken as established. As an excluded alien, she would have been subject, at the time she attempted to enter in 1951, to Section 18 of the Immigration Act of 1917, as amended (8 U. S. C. (1946 ed.) 154), providing that she should be returned to the country whence she came. She is in the same position under Section 237 (a) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1227 (a)), whic

also provides for the return of excluded aliens. Her removal from the vessel in which she arrived, for the purpose of inquiry into her right to be admitted, did not change her status as an excluded alien; she remained subject to return to the country from which she came, both under the former statute (Section 15 of the Immigration Act of 1917, 8 U. S. C. (1946 ed.) 151) and under the 1952 Act (Section 233, 8 U. S. C. 1223). *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *United States* v. *Ju Toy*, 198 U. S. 253, 263; *Knauff* v. *Shaughnessy*, 338 U. S. 537.

Nor did petitioner's enlargement on parole, in order to give her an opportunity to prove her eligibility to enter, change her status. Section 212 (d) of the 1952 Act (8 U. S. C. 1182 (d) (5)) specifically provides that parole of an alien applying for admission "shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." See, also, *Kaplan* v. *Tod*, 267 U. S. 228.

Petitioner contends, nevertheless, that under Section 243 (h) of the 1952 Act, she is an alien "within the United States" who is entitled to have her application for a stay of deportation entertained on her claim that she would be subject to physical persecu-

tion if returned to the country whence she came. That section, *supra*, p. 2, provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

Petitioner argues that the section applies to her because she has been physically within the United States. It is the government's position, on the other hand, that Section 243 (h) applies only to aliens who, in contemplation of law, were within the country; that it does not apply to an excluded alien—one who, in contemplation of law, has been stopped at the border and not allowed to come in; and that petitioner's physical presence here, under detention or parole, does not change her status from that of an excluded alien.

The question is not one of Communist ideology (Pet. 11), of humanitarian principles (Pet. 16), or of Immigration and Naturalization Service policy (Pet. 17). The problem is wholly one of statutory construction. Since no alien, not even a lawfully admitted resident alien, has a constitutional right to remain in the United States,[3] it necessarily follows that any act withholding deportation is an act of Congressional grace, to be applied on such terms as Congress has prescribed. As we show *infra*, the provision for withholding deportation on grounds of

[3] See, *e. g.*, *Knauff* v. *Shaughnessy*, 338 U. S. 537.

physical persecution is of fairly recent origin. This in itself indicates that the Section is not part of any long-established, well-recognized right of an alien, resident or non-resident. Clearly, an alien seeking admission—a person who does not have the constitutional protections accorded a resident alien[4]—cannot, as a matter of right, claim the relief here sought. The only question in this case, therefore, is whether Congress intended the provisions of Section 243 (h) to apply to one in the status of petitioner, *i. e.*, an alien seeking admission to the United States who has been denied permission to enter. We think it is plain that Congress did not so intend.

I

SECTION 243 (h) APPLIES TO EXPELLED, NOT EXCLUDED, ALIENS

A. The context of Section 243 (h) shows that the section applies only to expulsion and not to exclusion cases

Although the word "deportation" is used generally to denote any physical transportation of an alien out of the country, there is a clear legal distinction between exclusion and removal of an alien whose application for admission is denied, and expulsion and deportation, after apprehension and arrest, of an alien found within the United States. *Kwong Hai Chew* v. *Colding*, 344 U. S. 590; *Knauff* v. *Shaughnessy*, 338 U. S. 537. As this Court said in *Shaughnessy* v. *Mezei*, 345 U. S. 206, 212:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to

[4] *Shaughnessy* v. *Mezei*, 345 U. S. 206; *Kwong Hai Chew* v. *Colding*, 344 U. S. 590; *Knauff* v. *Shaughnessy*, 338 U. S. 537.

> traditional standards of fairness encompassed in due process of law * * *. But an alien on the threshold of initial entry stands on a different footing: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

The practical and historical distinction between exclusion and expulsion is clearly delineated in the Immigration and Nationality Act of 1952. See *Dong Wing Ott* v. *Shaughnessy*, 245 F. 2d 875, 247 F. 2d 769 (C. A. 2), petition for certiorari pending, No. 655, this Term. Whenever the word "deported" is used in the statute in connection with exclusion, it appears in a context which preserves the distinction between its use in the colloquial sense of transportation out of the country, and its use in the legal and technical sense of expulsion. See, *e. g.*, Section 212 (a) (16), referring to "Aliens who have been excluded from admission and deported * * *." The whole structure of the Act shows that the different consequences of exclusion and expulsion were recognized by Congress. Provisions relating to exclusion appear in Chapters 2 and 4. Chapter 5 deals exclusively with expulsion. The Act enumerates grounds for exclusion which are distinct from those for expulsion (cf. Section 212 (8 U. S. C. 1182) with Section 241 (8 U. S. C. 1251)). Separate administrative processes are established for purposes of determining whether grounds exist for exclusion (Section 236 (8 U. S. C. 1226)) as opposed to expulsion (Section 242 (8 U. S. C. 1252 (b))). Excluded aliens and expelled aliens are subject to separate provisions relative to removal and transpor-

tation (cf. Section 237 (8 U. S. C. 1227) with Sections 242–244 (8 U. S. C. 1252–1254)), and to separate provisos relative to the grant of a stay or suspension (cf. Section 237 (d) (8 U. S. C. 1227 (d) with Sections 243 (h), 244 (8 U. S. C. 1253 (h), 1254)). Section 243 (h), here in question, appears in the chapter on expulsion. It is the last subdivision of a section which provides for "countries to which aliens shall be deported", a section which, as we show *infra*, pp. 15–18, was obviously not intended as a directive applicable to excluded aliens. It is preceded by sections spelling out the classes of resident aliens subject to expulsion and deportation (Section 241) and the administrative process by which deportability, in the sense of expulsion, is to be determined (Section 242). It is followed by a section providing for suspension of deportation and voluntary departure (Section 244). Thus, the context of Section 243 (h) in itself establishes that the provision for withholding deportation was intended to apply only to expulsion proceedings, not to exclusion cases.

B. The legislative history of Section 243 (h) shows that it applies only to expulsion of resident aliens

Section 243 (h) had its genesis in H. R. 10, the so-called Hobbs bill, introduced in the 81st Congress because of the concern with this country's inability to execute outstanding warrants of deportation against aliens at large in the country.* Despite de-

* It was estimated that at the time there were 4,000 aliens in the country against whom final orders of deportation had been issued without avail. See Hearings before Subcommittee No. 1

bate in the House pointing out that the bill might make deportation of an alien resident a death sentence,[6] it passed that body devoid of any reference to physical persecution. It was reported favorably in the Senate where, for the first time, the following provision was added:

> No alien shall be deported under any provision of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution.[7]

Thereafter, the principal provisions of H. R. 10, including the above prohibition, were incorporated (as Section 23) into S. 4037, an omnibus bill consolidating various bills proposed in the interest of internal security. The Majority Report of the Senate Committee on the Judiciary had this to say of Section 23 of S. 4037 (S. Rep. 2369, 81st Cong., 2nd Sess., pp. 14–15):[8]

> The purpose of section 23 is to amend existing laws relating to the *deportation of aliens* so that there may be more effective control over

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of the Committee on the Judiciary, House of Representatives, 81st Cong., 1st Sess., on H. R. 10, May 20, 1949, pp. 3–5. It was brought out that some of the more undesirable aliens had been in the country under final order of deportation for as long as 18 to 21 years. See H. Rep. 1192, 81st Cong., 1st Sess., pp. 8, 9.

[6] 96 Cong. Rec. 10452. See, also, Minority Views, H. Rep. 1192, 81st Cong., 1st Sess., pp. 17, 18.

[7] July 17, 1950, 96 Cong. Rec. 10460.

[8] S. Rep. 2239, 81st Cong., 2nd Sess., pp. 4, 10; 96 Cong. Rec. 11724. This language remained unchanged through various incorporations and revisions until the passage of the Immigration and Nationality Act of 1952, when it was superseded by the present language of Section 243 (h). See *infra*, p. 2.

deportable aliens who cannot be deported for reasons *beyond the control of the United States*. The major provisions are as follows:

1. The authority of the Attorney General to determine the country to which an alien *unlawfully in the United States* is to be deported is enlarged.

2. The procedure to be followed and the control to be exercised by the Attorney General in dealing with aliens *illegally in the United States* is specified, and criminal penalties for violation of the terms of supervision of deportable aliens are provided.

3. Criminal penalties for deportable aliens in the criminal, subversive, and immoral classes who willfully fail *to depart from the United States* are provided, but the courts, under certain conditions, are vested with power to release such aliens from confinement. [Emphasis added.][9]

H. R. 9490 was substituted for S. 4037, but Section 23 remained the same. The House bill became law as the Internal Security Act of 1950, 96 Cong. Rec. 15632, 15726. The conference report to the House (No. 3112, 81st Cong., 2d Sess.; 96 Cong Rec. 15282–15283) stated:

Section 23 of the conference substitute amends section 20 of the Immigration Act of February 5, 1917, as amended (8 U. S. C. 156), in order to provide more effective con-

[9] Debates on the floor of the Senate (96 Cong. Rec. 14170, *et seq.*) similarly show that the deportation referred to was that of deportation in the sense of expulsion.

trol over, *and to facilitate the deportation of, deportable aliens.*

* * * * *

The first sentence of such subsection (a) broadens the authority of the Attorney General under existing law to determine the country to which an alien *unlawfully in the United States* may be deported. The existing first sentence of section 20, which listed the countries to which an alien may be deported, is restrictive in scope. The new first sentence of subsection (a) provides that an alien may be deported to the country specified by the alien if such country is willing to accept him into its territory. In addition, it gives the Attorney General more latitude in *effecting the deportation of a deportable alien* (1) by enlarging the list of countries and places to which such alien may be deported if the country specified by such alien is unwilling to accept him into its territory or if he does not specify any country, and (2) by permitting the Attorney General to select the country or place to which such alien may be deported, within his discretion and without priority of preference because of the order in which such countries and places are set forth in the new sentence. It is further provided that no alien shall be deported to any country in which the Attorney General finds that such alien would be subjected to physical persecution. [Emphasis added.]

It is clear from this documentation that the 1950 act was aimed at deportable resident aliens, and that there was no thought that the section would apply to excluded persons. Congress was acting in the inter-

est of internal security to rid the country of undesirable aliens within its borders, and the prohibition against deportation of an alien to a country where he might be subject to physical persecution was an exception considered solely applicable with regard to such expulsion. The provision of Section 18 of the Act of 1917 (now Section 237 (a)), that *excluded* aliens be immediately sent back to the country from whence they came, remained unaffected by the Internal Security Act of 1950.

This conclusion that Congress intended that only deportable aliens might apply for a stay on grounds of persecution is further buttressed by subsequent changes in the language of this provision. While Section 20 of the Act of 1917 (as amended, 8 U. S. C. (1946 ed., Supp. V) 156 (a)) referred to deportation "under any provisions of this chapter",[10] Section 243 (h) of the 1952 Act makes it clear that the deportation which the Attorney General is authorized to withhold is that of "any alien within the United States." Subsection (a) of the same section likewise refers to the deportation of an "alien in the United States."

There are obvious reasons why Congress would make the provision for withholding of deportation on the ground of persecution applicable only to deportation, not exclusion. Deportation may apply to aliens who have resided in the United States for many years. It is one thing for Congress to recognize a

[10] "This chapter" at that time was "Chapter 6—Immigration." The original of this subsection read "Act", referring to the Immigration Act of 1917.

responsibility to such aliens not to send them to a place where they will suffer persecution; it is quite another for Congress to assume a similar responsibility toward aliens who have not been within the protection of the United States and merely seek to enter from a foreign country. If a claim of danger of persecution in the country from which he came would give an alien a right to remain in the care of the United States, even though not technically an entrant, the result could well be, as a practical matter, a flood of physical entries by persons who would otherwise be inadmissible.

C. Neither detention in custody nor enlargement on parole makes an excluded alien a person "within the United States" in the sense of Section 243 (h)

Petitioner argues that the fact that she has been here physically for over two and a half years differentiates her situation from that of the ordinary excluded alien and brings her within the purview of Section 243 (h). The statute and a settled course of decision lead to the contrary conclusion.

Petitioner was permitted to remain here on sufferance, for her own benefit. Although she was detained in custody for some fifteen months and enlarged under parole for some seventeen additional months, this was merely to give her an opportunity to prove, if she could, her eligibility to enter. Almost immediately after the final administrative decision holding her ineligible to enter, she was ordered to surrender for deportation. She is an alien who has been excluded—not allowed to come in. Her physical presence here during the pendency of the determination cannot

transform her status in any respect. In legal contemplation, she is not within the United States.

This conclusion is dictated by the 1952 Act. Section 212 (d) of that Act provides:

> (5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, *but such parole of such alien shall not be regarded as an admission of the alien* and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled *and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.* [Emphasis added.] [11]

Congress thus made it clear beyond doubt that the parole of an alien applying for admission does not entitle him to special treatment.

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[11] With regard to this section, H. Rep. 1365, 82d Cong., 2d Sess., on H. R. 5678, states (p. 52):

"* * * The provision in the instant bill represents an acceptance of the recommendation of the Attorney General with reference to this form of discretionary relief. The committee believes that the broader discretionary authority is necessary to permit the Attorney General to parole inadmissible aliens into the United States in emergency cases, such as the case of an alien who requires immediate medical attention before there has been an opportunity for an immigration officer to inspect him, and in cases where it is strictly in the public interest to have an inadmissible alien present in the United States, such as, for instance, a witness or for purposes of prosecution."

Even before this explicit 1952 legislation, this Court had held, in *Kaplan* v. *Tod*, 267 U. S. 228, that parole did not place an excludee within the country. In that case, a feeble-minded child, released on parole into the care of a social agency, was claimed to have acquired nationality by the naturalization of her father while she was physically in the United States, under a statute granting naturalization to children "if dwelling in the United States." Rev. Stat. 2172. This Court, speaking through Justice Holmes, said of that contention, 267 U. S. at 230:

> * * * The appellant could not lawfully have landed in the United States in view of the express prohibition of the Act of 1910 just referred to, and until she legally landed "could not have dwelt within the United States." *Zartarian* v. *Billings*, 204 U. S. 170, 175. Moreover while she was at Ellis Island she was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared. *United States* v. *Ju Toy*, 198 U. S. 253, 263. When her prison bounds were enlarged by committing her to the custody of the Hebrew Society, the nature of her stay within the territory was not changed. She was still in theory of law at the boundary line and had gained no foothold in the United States. * * *

See, also, *Shaughnessy* v. *Mezei*, 345 U. S. 206, 213.

Decisions of long standing have settled the principle that mere physical presence within the boundaries of this country does not change the status of an alien applying for admission. *United States* v. *Ju Toy*, 198

U. S. 253; *Nishimura Ekiu* v. *United States*, 142 U. S. 651.

The cases arising in the District of Columbia Circuit, upon which petitioner relies, cannot be squared, we submit, with the statute or with this Court's rulings. In *Quan* v. *Brownell*, to be argued immediately after this case (No. 396), the Court of Appeals for the District of Columbia Circuit held that an alien paroled into the United States under Section 212 (d) (5) of the 1952 Act is "within the United States" in the meaning of Section 243 (h). 248 F. 2d 89. It reasoned that, since the word "deportation" is used in the provisions relating to exclusion, there is no significant difference between "exclusion" and "expulsion" cases. The fallacy of this is pointed out by the Court of Appeals for the Second Circuit in *Dong Wing Ott* v. *Shaughnessy*, 245 F. 2d 875, 247 F. 2d 769 (C. A. 2), petition for certiorari pending, No. 655, this Term, in which the opinion on rehearing comments on the intervening *Quan* decision as follows (247 F. 2d at 770):

> We think our brothers of the District of Columbia have overlooked the continuing vitality of *Kaplan* v. *Tod*, 267 U. S. 228, and cases following it. There it was held that an alien who had been ordered excluded at the time of his attempted entry, but who was released into the United States on parole pending legal proceedings, did not have his status as an excludee affected and the parole did not place him "within the United States" as that phrase is used in the immigration statutes. This distinction between exclusion from entry into the United States because of legal inadmissibility and expulsion

under an order of deportation after entry is carefully preserved in the Immigration and Nationality Act of 1952, where Part IV, 8 U. S. C. §§ 1221–1230, contains "Provisions Relating to Entry and Exclusion", while Part V, 8 U. S. C. §§ 1251–1260, deals with "Deportation; Adjustment of Status." Examination of these respective statutes shows a careful differentiation of procedure, see, *e. g.*, 8 U. S. C. § 1226, "Exclusion of aliens—Proceedings," as compared with 8 U. S. C. § 1252, "Apprehension and deportation of aliens—Arrest and custody; review of determination by court."

The provision here in issue giving the Attorney-General certain discretionary power to suspend deportation is found only in Part V, 8 U. S. C. § 1253 (h); and in the 1952 revision Congress deliberately inserted the words "within the United States" in the earlier act (former 8 U. S. C. § 156, as amended in 1950) as though to make clear that it did not apply to excluded aliens. Hence it did not apply to these plaintiffs, only within the country on parole, which by statute "shall not be regarded as an admission of the alien" and when terminated shall leave their case "to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U. S. C. § 1182 (d) (5). We do not regard this precise statutory scheme as destroyed or limited by the occasional use of "deportation" in its more colloquial sense, *e. g.*, 8 U. S. C. § 1226 (a), "shall be excluded and deported," or 8 U. S. C. § 1227 (a), providing for the immediate "deportation of aliens excluded from admission or entering in violation of law." The word so

used serves an obviously different function than in the Part V statutes dealing with deportation in its legal and technical sense.[12]

We believe that the Court of Appeals for the District of Columbia Circuit also erred in its decision in *Ng Lin Chong* v. *McGrath*, 202 F. 2d 316, although that case is distinguishable on its facts from the present one. There, the court held that, where the government had chosen to delay the deportation of an alien subject to immediate rejection for the purpose of prosecuting him, it could not thereafter proceed to enforce his departure under Section 18 of the 1917 Act (dealing with exclusion), but must resort to procedures outlined in Section 20, as amended, regulating deportation in the sense of expulsion. The decision was a narrow one[13] based on the fact that, because the appellants were not "immediately sent back * * *" as contemplated by Section 18, no alternative procedure was available to the Attorney General under the earlier statute (202 F. 2d at 319–320). In the instant case, petitioner's deportation was not delayed by the Attorney General; her detention and parole were accorded solely to give her an opportunity to prove her right to enter, and she was notified to

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[12] See, also, *United States ex rel. Lue Choie Yee* v. *Shaughnessy*, 245 F. 2d 874 (C. A. 2); *Jew Sing* v. *Barber*, 215 F. 2d 906 (C. A. 9), certiorari granted, 348 U. S. 910, vacated for mootness, 350 U. S. 898.

[13] The court found it unnecessary to resolve the question whether aliens subjected to immediate deportation within the meaning of Section 18 would be entitled to the protection of Section 20, as amended. (202 F. 2d at 319, note 21).

surrender for immediate rejection when she failed to do so.[14] If the *Ng Lin Chong* decision can be justified at all, it is only on the basis of ambiguities in the prior statute under which it arose—ambiguities certainly erased by the 1952 Act. As pointed out above (p. 18), Section 243 (h) contains the phrase "within the United States," which did not appear in the prior statute. The earlier provision referred to deportation "under any provisions of this *chapter*" (emphasis added); and the chapter included exclusion provisions as well as those pertaining to deportation proper. Section 243 (h) of the 1952 Act refers merely to "deportation" and, as discussed *supra* (pp. 12–14), is placed in such a context that it can properly be understood as referring only to deportation of aliens who are technically as well as physically "within the United States". And finally, the provisions of Section 212 (d) (5) of the 1952 Act (pp. 3, 20, *supra*) make it explicit that one paroled by the Attorney General is not to be treated as other than an applicant for admission. In view of the legislative history of Section 18 of the 1917 Act, set forth above (pp. 14–18), we think the *Ng Lin Chong* decision incorrect, even under the prior statute. But, in any event, its reasoning is not applicable here.

Petitioner, in sum, is seeking a privilege granted by a statute which does not apply to one in her status. Having been found ineligible to enter, the purpose for which her parole was granted has been served, and

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[14] Petitioner had no prior residence in this country, as did the aliens in *Ng Lin Chong*.

Section 212 (d) (5) requires that she be immediately deported in accordance with the provisions of Section 237 (a).

II

AN APPLICATION UNDER SECTION 243 (h) DOES NOT PRESENT THE QUESTION OF THE RIGHT OF AN EXCLUDED ALIEN TO CONTINUATION OF PAROLE. PAROLE, IN ANY EVENT, IS AN EXCLUSIVELY EXECUTIVE MATTER.

Petitioner argues for the first time in this Court that the Attorney General has the power to exercise his discretion to continue her parole under Section 212 (d) (5) of the 1952 Act. Although this question was not, and is not now, before this Court, the government procured a delay in the present proceedings to permit petitioner to request further parole, recognizing that Section 212 (d) (5) was broad enough, in appropriate circumstances and in the discretion of the Attorney General, to permit parole of an excluded alien "for emergent reasons or for reasons deemed strictly in the public interest",[15] and that a claim of danger of physical persecution would be a relevant factor under that standard. Immediate consideration was given to petitioner's request and the Immigration and Naturalization Service (as the delegate of the Attorney General) has concluded that parole should be denied. We are advised by the Service that the request was denied because, among other reasons, the petitioner failed to establish, in the view of the Service, that she would be subject to physical persecution if removed to Communist China.

[15] The Attorney General is also given the power under Section 237 (a) of the 1952 Act to detain an alien, after an exclusion order has issued, when he considers it "practicable or proper".

The decision of the Attorney General, in the exercise of his discretion to grant or withhold parole into the United States, falls within the category of political determinations wholly entrusted to the executive branch of the government. Because of the international and diplomatic factors and the type of discretion involved, such a determination, we believe, may not be the subject of judicial review or inquiry. Cf. *Fong Yue Ting* v. *United States*, 149 U. S. 698; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 543; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–590; *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 210; *Galvan* v. *Press*, 347 U. S. 522, 531.

Moreover, that issue is not now here. Petitioner's application which gave rise to the present proceeding was a petition "in accordance with the provisions of 8 C. F. R. 243.3 (h)," asking for a stay of deportation on the ground that she would be subject, if deported, to physical persecution (R. 5). This application was denied by the Service because she was "not eligible for the relief afforded by Section 243 (h)" (R. 7). Her complaint, alleging abuse of discretion and denial of due process of law, was based solely on this action of the Service denying the 243 (h) application (R. 5–6). Thus, the sole issue before this Court is whether she is an alien "within the United States" who is entitled to have an application for a stay of deportation entertained under Section 243 (h). For the reasons hitherto discussed, the Attorney General has no power to grant relief under Section 243 (h) to an excluded alien.

The only power which the Attorney General has with respect to a claim of physical persecution by excluded aliens stems from 212 (d) (5), and not from 243 (h). The sections are distinct as to applicability. Section 212 (d) (5) occurs in Chapter 2 dealing mainly with admission qualifications for aliens; Section 243 (h), as noted above (p. 14), appears in Chapter 5, dealing exclusively with expelled aliens. The standards which the Attorney General is to apply in a determination under each section are distinct. While the danger of physical persecution of an individual is a factor to be considered in determining whether his detention and parole would be justified for "emergent reasons" or "reasons deemed strictly in the public interest", it is obviously only one factor to be weighed in conjunction with other considerations. Section 212 (d) (5) does not purport to confer on excluded aliens the benefits which Congress, in Section 243 (h), conferred on aliens who, unlike petitioner, are actual residents of the United States.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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